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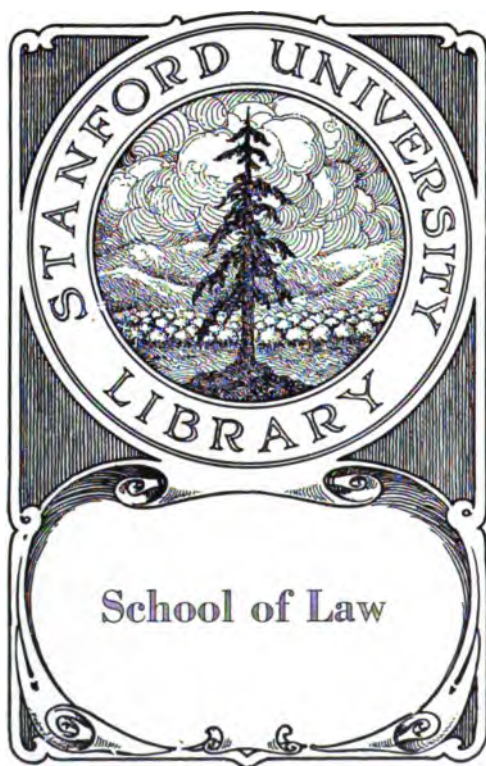
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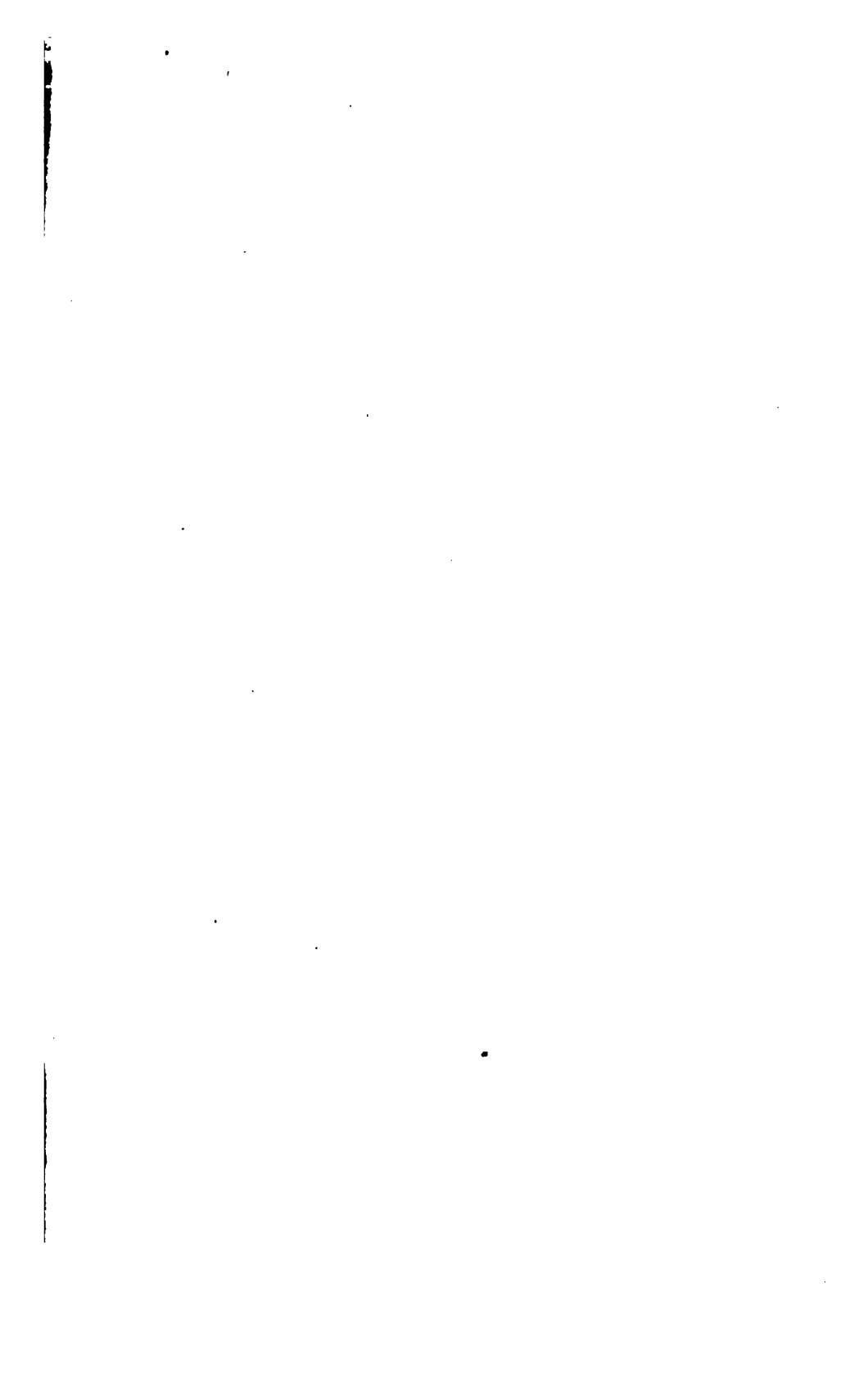
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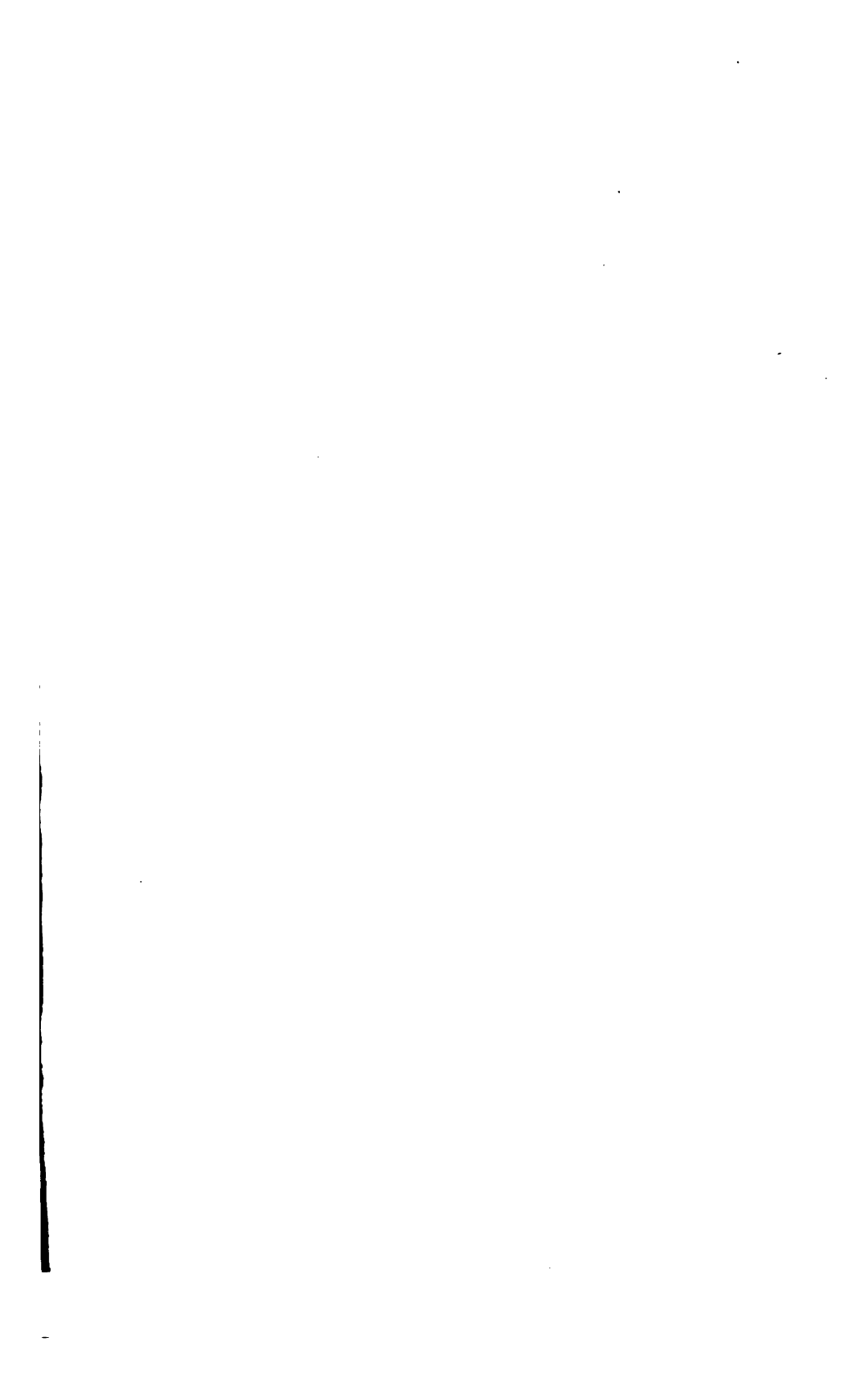
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784

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Edited by
E. DOUGLAS ARMOUR,
Of Osgoode Hall, Barrister-at-Law.

VOL. IV.

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THE CANADIAN LAW TIMES.

VOL. IV.

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No. 1.

THE CONSTITUTIONAL STATUS OF THE NORTH- WEST TERRITORIES OF CANADA.

IT is a matter of regret to the profession at large, and in particular to the practitioners in Manitoba and the North-West Territories, that the reports of cases decided in the courts of Manitoba are not accessible for reference, particularly in regard to questions of constitutional law, which must, one would imagine, in the natural course of events, have been discussed in the courts of that Province. Nor do the various books that have been written on the history of Canada throw much light on such questions. Now, inasmuch as a clear understanding of the history of the acquisition of a colony by the Crown, and a correct view of the laws in force at the time of such acquisition are of vital importance to the practitioner in such colony, it becomes necessary for each member of the profession in the North-West Territories to investigate the entire subject *de novo*. The conclusions arrived at in this paper may be entirely at variance with decided cases in Manitoba, but all the available material has, it is believed, been utilized, and the *pros* and *cons* are, it is hoped, fairly discussed.

Acquisition and Incorporation of the North-West Territories with Canada.—It is provided in the 146th section of the British North America Act that, on a joint address from the Houses of the Parliament of Canada, the Queen might

admit Rupert's Land and the North-Western Territory into the Dominion of Canada upon such terms and conditions as might be expressed in the address, and as Her Majesty should think fit to approve. The chief difficulty in the way of the incorporation of the then Great Lone Land with the Dominion lay in the rights and privileges undoubtedly conferred on the Hudson's Bay Company by Charles II, and the extraordinary claims urged on behalf of the Company in regard to the rest of the Territory. "The Governor and Company of adventurers of England trading into Hudson's Bay" not only claimed the sole and exclusive right of carrying on trade and commerce in the territory, but they also urged that the fee simple in the land had been granted them by their Charter, and that the alleged title of the Crown depended solely on the supposition that, at the time the Charter was granted, these territories, or a portion of them, belonged to New France, and were excepted out of the lands granted by the Charter; and that the French title was transferred to the English Crown on the final cession of Canada or New France by France (a).

However important the bearing of this question of the constitutional law of the North-West Territory, the Government of Canada do not appear to have been very much troubled by the claims of the Hudson's Bay Company, and in the first session of the House of Commons the question of the incorporation of Rupert's Land and the North-Western Territory with Canada was energetically pressed. In December, 1867, a committee was appointed to consider resolutions with this object in view; in due time the committee reported; an address embodying the resolutions of the committee was passed by the House (16th December, 1867), adopted by the Senate, and forwarded to England (b).

It can easily be imagined that these proceedings of the Canadian Parliament were noticed with alarm by the

(a) See letter from Sir Edmund Head, Govr. of H. B. C. to Colonial Secretary, dated 25th Jan. 1868. Journals H. of C. Vol. I. p. 370.

(b) Journals H. of C. Vol. I. pp. 67 *et seq.*

Hudson's Bay Company, and as soon as they succeeded in obtaining the text of the address to Her Majesty a vigorous letter of remonstrance (c) was forwarded by their Governor, Sir Edmund Head (formerly Governor-General of Canada), to the Colonial Secretary, in which the claims of the Company were strongly pressed, and various opinions of the Law Officers of the Crown in favour of the validity of the Charter were cited. The Colonial Secretary—The Duke of Buckingham and Chandos—accordingly informed the Dominion Government, by letter dated 23rd April, 1868 (d), that the claims of the Company, supported by so much legal authority, were not to be ignored. Little doubt however appears to have been felt that the Hudson's Bay Company either would consent to, or could be forced into, a satisfactory arrangement; and on the 31st July, 1868, the "Rupert's Land Act, 1868" (e), was passed by the Imperial Parliament in pursuance of the 146th section of the B. N. A. Act, 1867.

The "Rupert's Land Act, 1868," after defining Rupert's Land (sec. 2) as "the whole of the land and territories held or claimed to be held by the said Governor and Company," provided that the Company should have power to make, and Her Majesty to accept, a surrender of the lands, privileges, &c., upon terms and conditions to be agreed upon; provided however that such surrender should not be accepted by Her Majesty until the terms and conditions on which Rupert's Land should be admitted into the Dominion of Canada should have been approved by Her Majesty and embodied in an address from both Houses of the Parliament of Canada, in pursuance of the 146th sec. of the B. N. A. Act, 1867; and further that unless within a month of the surrender by Her Majesty, Rupert's Land should be actually admitted into the Dominion the deed of surrender should be null and void.

In August following, a letter was received by the Governor-General informing him that the Colonial Secretary,

(c) *Vide* note (a).

(d) Journals H. of C. Vol. I. p. 367.

(e) 31 & 32 Vict. cap. 105.

in pursuance of the above Act, proposed entering into negotiations with the Company for the purpose of arranging the terms and conditions of the surrender. Accordingly, in October of the same year, Sir George Etienne Cartier, and the Hon. Wm. Macdougall were sent as delegates to England to represent the Dominion in the negotiations with the Company. The result of their mission was that, after considerable delay, occasioned mainly by the change of government in England when Mr. D'Israeli was defeated, a memorandum of terms and conditions was agreed to between the parties. These terms were afterwards assented to by the Canadian Parliament (*f*).

The main points in the agreement were, that the Company should surrender their proprietary rights to Her Majesty: the Company to have the right of selecting a block of land adjoining each of its stations, the aggregate extent of such blocks not to exceed 50,000 acres; for fifty years after the surrender, the Company to be entitled to one twentieth of the lands in any Township or District within the Fertile Belt in which land should be laid out for settlement, and to receive from Canada the sum of £300,000 in cash. The Company also retained the ordinary privileges of trade and commerce.

How much the Company has been benefitted by this arrangement and the subsequent settlement of the country is familiar to every one who takes any interest in the affairs of Manitoba and the North-West Territories.

For the purpose of carrying out this arrangement a joint address of both Houses of Parliament was forwarded to Her Majesty in June, 1869, but owing to delays the necessary Order in Council was not passed by the Queen until the 23rd day of June, 1870 (*g*). By this Order the North-western Territory was admitted into, and became part of, the Dominion of Canada from and after the 15th day of July, 1870, and Rupert's Land on the terms and conditions of the address of 1869.

(*f*) 14th May, 1869; Journals H. of C. Vol. II. pp. 144 to 148.

(*g*) Stat. of Canada, 35 Vict. p. lxiii.

In anticipation of the Imperial Order in Council the Canadian Parliament had passed various statutes for the order and good government of the new territory, but it is not proposed at present to review this legislation. Let us now turn our attention to the constitutional position of the North-West Territories as a colony of Great Britain, and the laws in force at the time of its incorporation into Canada.

Just as there is considerable doubt whether the old Province of Canada is to be regarded as acquired by conquest or by cession, so it is difficult to decide whether the North-West Territories were acquired by the Crown by cession or by occupancy, or partly by cession and partly by occupancy. The difficulty is immensely complicated by the uncertainty and practical impossibility of accurately defining the old boundaries; and in any discussion of the subject it is almost impossible to avoid being plunged into that slough of despond "The Boundary Question."

In order, however, to arrive at results more easily, it will be well to state certain propositions as postulates, though all of them have been disputed by the partisans of one or other side in the arguments over the boundaries. Let it be granted then :

(1). That the Hudson's Bay Company were seised and in occupation of the territories about Hudson's Bay extending to a certain distance west and south of the same.

(2). That there was a large territory to the west of Hudson's Bay extending to the Rocky Mountains of which they were not in actual possession.

(3). That the boundaries of New France or Canada, at its cession to Great Britain in 1763, were undefined on the north and west, and that the boundaries given by the Quebec Act (1774) are not necessarily those of Canada in 1763.

Claims of the Hudson's Bay Company.—Now it would seem that the Hudson's Bay Company claimed title to the entire region that is now known as the North-West Territories including Manitoba, while their opponents urged that the Company had no title whatever to any portion of the

country, which they claimed was only acquired by Great Britain at a date long subsequent to the Company's Charter by cession from France. *In medio tutissimus ibis*. In the first place in regard to the territories claimed by the Company under their Charter, it is safe to say that by the terms of the Charter it is absolutely impossible to define them accurately (*h*).

The Charter (*i*) describes them as being, "All the lands and territories upon the countries, coasts and confines of the seas, bays, lakes, rivers, creeks and sounds aforesaid, that are not already actually possessed by or granted to any of our subjects or possessed by the subjects of any other Christian Prince or State * * * * and that the said lands be from thenceforth reckoned or reputed as one of our plantations or colonies in America, called Rupert's Land; and further we do by these presents make, create, and constitute the said Governor and Company for the time being, and their successors the true and absolute lords and proprietors of the same territory * * * * to be holden of us, our heirs and successors, as of our Manor of East Greenwich in our County of Kent, in free and common soccage." In reference to these "lands and territories," Mr. Justice Monk, of Lower Canada, in the important and interesting case of *Conolly v. Woolrich* (*j*), says, "The western boundaries have never been clearly settled or defined by judicial decision, or otherwise."

Early Occupation and Settlement of the Hudson's Bay Territories.—It becomes necessary to enquire to what extent, if any, Great Britain acquired any title by the occupancy and settlement of the Company, as it has been strongly urged that the French were in occupation and possession of the entire country previous to the commencement of operations by the Company. The Bay may have been visited by the Cabots in 1497, also, probably, by Verezanni

(*h*) M. Cauchon's Memorandum; Ont. Sess. Papers Vol. xiv. pt. vii. p. 6.

(*i*) Draper's Memo. Ont. Sess. Papers, Vol. xiv. pt. vii. p. 32.

(*j*) 11 L. C. J. 197.

who was sent out by Francis I. in 1524. It is doubtful whether Jacques Cartier visited it (say 1534) (*k*).

Then followed Willoughby in 1553, Frobisher in 1576, '77 and '78, Hudson in 1610, Baffin and Bylot in 1615, Fox and James in 1631. It seems however to be admitted that none of these discoverers or explorers made any attempt at permanent occupation or settlement, and ample authority might be cited to prove that mere discovery is not sufficient to establish a title in opposition to subsequent settlement. During the latter part of the sixteenth century there was a lively dispute between England and France as to the extent of their respective possessions in America. L'Escarbot, writing in 1598, claimed that New France extended on the West to the Pacific Ocean, and on the North to "cette terre que est dite inconnue, vers la mer glacée, jusqu'au Pole Arctique." M. Cauchon is probably correct in stating that "Gradually the state of the actual possessions of the two powers settled down into a sort of intelligible shape * * * the most northerly of the English possessions being known as New England, and all the country to the north thereof being known as New France, or Canada, where the French only were in possession" (*l*).

It must not however be assumed (as M. Cauchon seems to assume) that for this reason the British, or any other nation, were debarred from occupying any of this northern country beyond the districts actually occupied by the French. It is indeed claimed that between 1600 and 1670 the French traders and explorers actually occupied all the country afterwards claimed by the Hudson's Bay Company, and it is urged that the establishment of the Quebec Fur Company, in 1627, was a practical occupation by the French (*m*).

(*k*) Mr. Charles Lindsey, who has kindly revised this article, informs me that he has both of Jacques Cartier's books in his possession, and that he is satisfied Jacques Cartier never visited Hudson's Bay.—C. C. McC.

(*l*) M. Cauchon's Memo., Ont. Sess. Papers xiv. pt. vii. p. 11.

(*m*) It is worthy of note that in 1670, when Saint Lussou the envoy of the Governor of New France, Courcelles, or rather of Talon, the Intendant, planted the Cross of Christianity and the Arms of France at Sault Ste Marie, France laid claim to the "possession of this place Ste Marie du Saut, as also of Lakes Huron and Superior, the Island of Manatoulin,

Conolly v. Woolrich (n) is cited in support of these propositions, but it will be found on examination that this case applies almost exclusively to the regions to the west of what is here claimed as Hudson's Bay Territory, and that the charter of the Quebec Fur Company, as shown by Mr. Monk in his argument before the Boundary Commission (o) extended only to land already occupied by the Kings of France. Again, it is specifically claimed that La Conture, a missionary from Canada, established a mission on the shores of Hudson's Bay in 1663. Not only is this unsupported by documentary evidence (p), but Sieur Albanel, who only reached the Bay in 1672, says, in the *Relations* for that year (as translated by Mr. Charles Lindsey), "Hitherto this voyage had been considered impossible for Frenchmen, who, after having undertaken it already three times and not having been able to surmount the obstacles, had seen themselves obliged to abandon it in despair of success. The conduct of it was reserved to me. * * * I have opened the road in company with two Frenchmen and six savages (q)." On the other hand, it is admitted as beyond question that Gillam, an Englishman, built Fort Charles on the shores of the Bay in 1667, that two Canadians, De Grozelier and Radisson, were sent out from London and occupied places on the Bay in 1668, and that their occupation paved the way for that of the Hudson's Bay Company in 1670. On the whole then it would seem reasonably clear that Great Britain's title *by occupancy* to the land bordering on Hudson's Bay is established, through the agency of the Hudson's Bay Company and their precursors.

It is however argued that if France did not acquire title by occupancy, she certainly did, under the treaty of St. Germain-en-laye (1632), by which New France was relin-

and all countries, rivers, lakes and streams contiguous and adjacent thereto,
 * * * *bounded on the one side by the seas of the north and west, and on the other by the south sea.*" Parkman's "La Salle and the Discovery of the Great West," p. 43.

(n) 11 L. C. J. 197.

(o) Ont. Sess. Papers, xiv. pt. vii. p. 364.

(p) *Ibid.* p. 279.

(q) *Ibid.* p. 341.

quished to the French, on the ground that the commonly received interpretation of "New France" included all of America north of New England. This position can hardly however be seriously supported, and in the Treaty of Utrecht, in 1713, when France ceded all her claims (if any) to the Hudson's Bay Territory to Great Britain the words used (*rendre, restituer, and restituta*) imply, not a *surrender*, but a *restoration*, and would seem themselves to be an acknowledgment of previous title in Great Britain.

Occupation and Settlement of the Indian Territories.—Designating the country to the west of that actually occupied by the Hudson's Bay Company as the "Indian Territory," it seems, as a matter of history, to be beyond doubt that the French preceded the British by many years in the settlement and occupation of this country. M. Cauchon and Mr. Justice Monk both dwell upon the energy and enterprise of the French traders, which led them far into the country to the west and north-west of Hudson's Bay. Mr. Justice Monk, in *Conolly v. Woolrich (supra)*, says that the French extended over vast regions of the northern and north-western parts of the continent, certainly as far as the Athabasca country—say 58° N. Lat., 111° W. Lon.—and that Athabasca (and the intermediate country) belonged to the crown of France at that time (about 1670) to the same extent and by the same means as the country around Hudson's Bay belongs to Great Britain. "G. E. L." the editor of the valuable collection of documents on the Boundary Question published by the Ontario Government, which has been so often cited, says in a note to M. Cauchon's paper, "It is now historically established that the French before the cession of Canada occupied the whole country of the Saskatchewan. They had several forts in the river, one of them (*r*) at its source in the Rocky Mountains." Again Hartwig says (*s*), in speaking of the *Coueurs des bois*, "So much is certain, that their regular expeditions extended as far as the Saskatchewan, 2,500 miles beyond the remotest European settlements. Several

(*r*) Fort la Jonquiére ?

(*s*) Polar World, p. 306.

factories or forts protected their interests on the banks of that noble river, and the French would no doubt have extended their dominions to the Rocky Mountains, or to the Pacific, if the conquest of Canada by England, in 1761, had not completely revolutionized the fur trade."

Moreover the papers of the Hudson's Bay Company afford the strongest evidence in favour of the first settlement by the French. In a letter written by the Governor of the company to the Colonial Secretary, 12th December, 1876, he says (*t*), "At the time of the passing of the Quebec Act, 1774, the company had not extended their posts and operations far from Hudson's Bay," and the Dominion Land Agents, in 1877, inform the Government that it appears from an inspection of the records of the Company, that it was not the practice of the company's agents to go up into the country to buy peltry; that the French traders had for some time prior to 1778 gone up into the Red River district, and that there was apparently a "Franceway Settlement" on the Saskatchewan (*u*).

In the face of this evidence, most of which seems to have turned up since M. Cauchon wrote his valuable, but partisan paper in 1857, it is impossible to agree with his conclusion that the discovery and settlement of the Indian Territories was due to British-Canadian pluck and energy, and more particularly to Mackenzie (1793), and Thompson (1811) (*v*).

As credit has been given to the British for the occupation of the Hudson's Bay Company, it must be acknowledged that so far as *actual occupation* is concerned the French were the first in the field in the Indian Territory.

Disputed points of International Law.—Granting the conclusion just arrived at to be correct, viz., that the French were in actual possession of the Indian Territories—the Hudson's Bay Company claimed as a matter of international law that their occupation of the territory at the

(*t*) Ont. Sess. Papers, xiv. pt. vii. p. 251.

(*u*) *Ibid.* p. 255.

(*v*) *Ibid.* p. 25.

mouths of the rivers flowing into Hudson's Bay, gave them the right to the entire territory watered by these rivers, by the lakes which they drained and the rivers emptying into those lakes, i.e., practically to the Rocky Mountains. A great deal of authority is cited in support of this position, and it is further argued that this proposition was granted by France in the Treaty of Utrecht. Thus in Twiss' Oregon, p. 226, he says, "By the treaty of Utrecht the British possessions to the North-West of Canada were acknowledged to the headwaters of the rivers emptying into the Bay of Hudson. By the Treaty of Paris they were united to British possessions on the Atlantic by the cession of Canada with all her dependencies, and France contracted her dominions within the right bank of the Mississippi."

Mr. Mowat made a very strong argument in opposition to these positions before the Boundary Commission, dwelling particularly upon the unreasonableness of the first proposition, when applied to 3,000 miles of country. He said, "There is no sound reason to sustain a rule for giving to the discoverers of the Bay into which these rivers flow, a right to stop such explorations and settlements in favour of discoverers (if the English were such) who did not choose to occupy the interior of the country." It would certainly appear to be a reasonable rule of law that "unless discovery has been followed within a reasonable time by some sort of settlement, the presumption arising out of notification is rebutted by *non-user*, and lapse of time gives rise to the opposite presumption of abandonment" (w).

Mr. Justice Monk seems to think that the Hudson's Bay Territory extended as far west as the navigable waters of the rivers flowing into the bay—but not the lakes &c., drained by them.

However, even admitting that France did relinquish her claims to the Indian Territory by the Treaty of Utrecht, it is difficult to see how the country, occupied and settled by

(w) Twiss, Law of Nations in time of Peace, p. 166.

the French, can be regarded as acquired in any other way than by cession. Giving all attention to the arguments urged on behalf of the Hudson's Bay Company, it seems absurd to say that they acquired by occupancy a country already occupied, simply by taking possession of the mouths of the rivers which drain that country.

Treaty of Paris.—The full text of the Treaty of Paris (1763) can be found in Chalmers' Treaties (x).

By Article IV. France ceded "Canada with all its dependencies * * * in the most ample manner and form without restriction." By Article VII. "It is agreed that for the future, the confines between the Dominions of His Britannic Majesty and those of His Most Christian Majesty * * * shall be fixed irrevocably by a line drawn along the middle of the Mississippi from its source " to the sea.

Now in the description in Article IV. the Indian Territories would appear to be included. Mr. Justice Monk who speaks of the treaty as that "by which all the French possessions on the continent of America were ceded by France to Great Britain" (y) evidently construes this article as including these territories. It seems then probable that the Indian Territories were acquired by cession—either through the medium of the Treaty of Utrecht, or that of Paris, or by both; though in the absence of direct judicial decision one hardly likes to be in any way dogmatic on a point open to so much controversy, and deserving much more learned and acute attention than the writer can possibly be expected to bestow upon it.

Laws in force in North-West Territories in 1763, and how affected by subsequent enactments.—Reviewing the results so far arrived at it has been attempted to show—

(1). That a part of the North-West Territories, known as the Hudson's Bay Territory, of somewhat doubtful extent, was acquired by Great Britain by occupancy.

(x) Vol. I. p. 467.

(y) *Conolly v. Woolrich*, 11 L. C. J. 197.

(2). That the Western part was acquired from France, by cession, either by the Treaty of Utrecht, or Treaty of Paris, or partly by one and partly by the other.

Now, applying the ordinary principles of colonial law (z), by the occupation and settlement of the Hudson's Bay Company, the English law as it stood in 1670 was introduced into Hudson's Bay Territory so far as applicable to the situation and condition of the colony; and also all subsequent enactments of the British Parliament expressed to apply to the colony, or which it can be clearly inferred are intended to apply to all British subjects (a).

In a late Manitoba case (b) Mr. Justice Taylor says, "Up to the 11th April, 1862, the law in force here was the law of England at the date of the Hudson's Bay Company's Charter. Then on the 11th of April, 1862, the law of England as it stood at the date of Her Majesty's accession was introduced. This continued to the 7th of January, 1864, when the law of England as it stood at that date was declared to be the law of Assinaboia" (c).

In *Conolly v. Woolrich* (d), it is pointed out "That the English law, criminal and civil, was introduced and made applicable within the Territory to all persons belonging to the Company or living under them."

It is also to be observed that, within their own territories, the Company had certain legislative and judicial powers (e).

In regard to this, Sir R. Bethell and Sir H. S. Keating, in an opinion of 1857 (f) say, "The Company has under the Charter power to make such ordinances (which would be in the nature of by-laws) for the government of persons

(z) Leith & Sm. Blackstone, p. 17.

(a) *Brook v. Brook*, 9 H. L. C. 193; *Routledge v. Low*, L. R. 3 H. L. 100; *Hodgins v. McNeil*, 9 Gr. 305.

(b) *Keating v. Moises*, 3 C. L. T. 604.

(c) The learned Judge does not cite authorities, which are probably familiar enough to the profession in Manitoba. Apparently he is of opinion that the *occupancy* of the Hudson's Bay Company included Manitoba; the 11th April, 1862, is the date when the laws of Assinaboia were passed; see *Con. Stat. Man.* p. liv.; the 7th January, 1864, is the date of the amendment to the above; see *Ibid.* p. lxxix.

(d) 11 L. C. J. 210.

(e) *Ibid.*

(f) Forsyth Const. Law (1869), p. 435.

employed by them, and also power to exercise jurisdiction in all matters, civil and criminal; but no ordinance would be valid that was contrary to the common law."

In regard to the Indian Territories however, on the same principles of colonial law, the French law (if we are correct in classing this country as a colony acquired by cession) was in force in 1763, and remained so until altered by British authority (g).

The position, then, in 1763 would appear to be this: English law was in force in the eastern, French law in the western part of the North-West Territories. How then do subsequent enactments affect the question?

First, we have the proclamation of Quebec, 7th October, 1763. Mr. Justice Monk says, "there is nothing to be found in this or any subsequent proclamation abolishing or changing the customs of the Indians or the laws of the French settlers; nothing which introduced the English Common Law into these Territories." It is to be noticed that by this proclamation the Territories to the west and north of Canada and the Hudson's Bay Territory, were reserved for His Majesty's Indian subjects.

Then came the Quebec Act, 1774, but this certainly does not alter the law. Nor does the Constitutional Act of 1791 (h).

In 1803 (i), the Courts of Upper and Lower Canada were given jurisdiction over all offences committed within "the Indian Territories, or parts of America not within the limits of either of the said provinces * * * or of any civil government of the United States of America," and it was enacted that such offences "be deemed to be offences of the same nature, and shall be tried in the same manner and subject to the same punishment as if the same had been committed within the provinces of Lower or Upper Canada."

(g) Leith & Sm. Blackstone, p. 20.

(h) See judgment of Sewell, C.J., in "Report of Trials of Charles de Rheinhard and Archibald McLellan," Montreal, 1818.

(i) 43 Geo. III. cap. 138, printed in full in the de Rheinhard & McLellan Report, p. 1.

This would appear to be practically an introduction of the English Criminal Law as administered in Upper and Lower Canada.

In 1821, the Act 1 & 2 Geo. II. cap. 66, was passed, by which it was declared that the Act last quoted applied to Hudson's Bay Territory as well as to Indian Territory, and which further gave to the Upper Canada Courts civil as well as criminal jurisdiction. The important part of the Act, however, in the present connection is as follows:—"And that all and every contract, agreement, debt, liability and demand whatsoever, made, entered into, incurred or arising within the said Indian Territories, or other parts of America, and all and every wrong and injury to the person or to property, real or personal, committed or done within the same, shall be deemed to be of the same nature * * * * and be tried in the same manner and subject to the same consequences in all respects as if the same had been made, entered into, incurred, arisen, committed, or done within the said Province of Upper Canada, anything in any Act or Acts of Parliament, or grant, or charter, to the contrary notwithstanding: provided always that all suits and actions relating to lands * * * * shall be decided according to the laws of * * * England and shall not be subject to * * * * laws of Upper Canada" (j).

Here, at any rate, English law, as existing in Upper Canada (except in regard to land in which pure English law is to govern) would seem to be definitely declared to be the law of the North-West Territories, and this it would seem was the law in force when these Territories were incorporated with the Dominion in 1870.

(To be concluded.)

C. C. McCAUL.

(j) Sec. 6. See also 22 & 23 Vict. cap. 26, Imp.

EDITORIAL REVIEW.

Some Objections to the Torrens System.

We print at another page, another letter from Mr. Holmsted, in which he further explains the position which trusts occupy under the Torrens System. We think we correctly understand the position. What we desire to have proved is that *cestuis que trustent* occupy a better position under that system than they do now. Mr. Gawler says so, but that does not prove it. His opinion is entitled to weight no doubt, but it is not conclusive. A *cestui que trust* must under the Torrens System protect himself; that is what we consider to be its defect. A person who is able to protect himself will not require a trustee; a person who cannot do so has practically no protection. He is at the best in the hands of a public officer who is irresponsible. His only security is the conscience of his trustee. To say that he is better off under the Torrens System on account of the power of caveating, is to ignore the means which an active man now has of registering a *lis pendens* against land for the protection of his interest in it. The reports of the Australian system show a marvellous contrast between their system and the English system, but not so great a one between theirs and ours. We have already said all that we have to say on the subject of trust, and satisfy ourselves now with quoting from Mr. Maxwell's report to the Executive of the Straits Settlement upon the Torrens System and its working in the Australian colonies. He says, "A very important principle in the Torrens System of registration of title, and one which should be most jealously guarded, if that system is to retain the simplicity which is the main-spring of its success, is the non-recognition of trusts. No notice of trusts may be entered on the register, nor may any instrument declaring trusts be registered. The usual

simple transfer must be registered, and the trustees, notwithstanding their fiduciary position, appear there as the registered proprietors for all intents and purposes. * * * The trustee, being the registered proprietor, can give an absolutely indefeasible title to a person with whom he deals, and * * * beneficiaries, though the caveats provide a check upon frauds and breaches of trust, must rely mainly on the integrity of their trustees."

It abundantly appears that there are grave and serious matters in consideration in suggesting such a change, but one would suppose, from all that we have heard from the advocates of this system, that it was entirely unobjectionable. In fact, our friends of the Canada Land Law Amendment Association, in their now celebrated pamphlet, (worthy successor of the Reports of the Real Property Commissioners) have attempted to show that it is absolutely safe and certain in its operation. Anticipating the objection that Registrars might make mistakes, and that innocent parties might lose by them, they show that a guarantee fund was established in the Australian colonies by levying a fee on the first, or, if necessary, on every devolution of an estate by change of ownership. As to this, it is said in their pamphlet, p. 12, "Although this fund was thus provided, all reasonable precautions were taken to prevent frauds and the granting of certificates erroneously, and so perfect has the system proved, that we find in South Australia in 1876, the fund amounted to £40,000 stg. while the total amount of all claims made upon the fund during the seventeen years which the Act had been in operation amounted to £300 only. In the other Australian colonies similar results have been arrived at. The fund, therefore, must be regarded more as a matter of precaution, than as one which is likely ever to be largely drawn upon." Leaving out of the discussion the grammar of this quotation, is it in other respects correct? A very different report respecting this fund is given by Mr. Maxwell; on page 17, of the report he says, "Another circumstance which is likely to detract from the popularity of the measure in the estimation of the public in Australia, is the

difficulty, which amounts in some colonies almost to an impossibility, of successfully maintaining a claim upon the Assurance Fund. The Legislature has so fenced it round with precautions, that compensation is almost out of the reach of any claimant, however damnified. The admission of a claim amounts to the proof of laches on the part of the Department, and is, therefore, naturally resisted by every expedient of law." The truth of the matter appears to be that losses do occur, and that the only source from which compensation can be derived is practically closed. This fund then amounts to a tax upon the land, in addition to the expenses of conveyancing.

Drawing again for information upon Mr. Maxwell's report, another drawback to the introduction of this system is the fact that after it has been in operation as a voluntary measure for a time, there are two systems of registration in force. "This means," says Mr. Maxwell, "a registration office for each method, two establishments, two sets of registers and indexes, and great accumulation of records." The remedy for this is to make the new system compulsory, a proceeding which would, at least, be the throwing of every owner of land into an expensive judicial proceeding for the purpose of giving him a certificate of title, and would, perhaps, work great injustice to many by stirring up titles which if left alone would soon become perfectly good.

The law respecting title by possession and by prescription would undergo unknown changes. An owner of land, having been out of possession for twenty years, might with safety transfer the land to a purchaser, though a stranger might have been in possession adversely to the paper title for the whole of this period. It is the *registration* that gives the title, and not the conveyance or the possession. It is true that trespassers are not to be favoured, and that the statutes of limitations were not passed for their benefit. But these statutes have been passed on grounds of public policy, *ut sit finis litium*, and the proposed system seems to encourage litigation with respect to such claims, rather than to end it. If the trespasser does not apply for a certificate of title after the ex-

piration of the statutory period of limitation, he is liable to be ejected by a registered owner. If he does apply for a certificate, he will probably be thrown into a law suit with the registered owner, who on general principles of justice should receive notice of the trespasser's claim.

By the adoption of this system the law of mortgage would be almost completely changed. A mortgage under the Torrens System is not a conveyance of the land. It forms a lien or charge upon it, a sufficient difference in itself to work a great change in the law, without taking into account the *technique* of the proposed system.

That the system has been in operation notwithstanding these objections, is sufficient evidence that they are not fatal to it. But, before rushing into an amendment apparently so simple that it merely involves a change in the *mode of transfer*, it is well to know what some of the consequences are to be. Every disturbance of the law is followed by a certain amount of experimental litigation which is costly and unsatisfactory; and where an amendment of the kind suggested works such vast changes its adoption ought to be attended with great caution. If the land laws of the Province were very complicated or very unjust and oppressive, extraordinary changes would be justifiable. Our system of conveyancing and registration is, however, a simple and easily worked system, and people are as a rule satisfied with their titles. Every owner of land even now has his choice of quieting his title and getting an indefeasible certificate of ownership, or of leaving the quieting business alone, and the generality of them prefer the latter.

However, such discussions are not without profit; and as long as land law agitations are accompanied by the firing off of paper pamphlets only, and not by operations in dynamite, boycotting and agrarian crimes, no great harm will be done.

CORRESPONDENCE.

The Torrens System of Land Transfer.

To the Editor of the Canadian Law Times :

SIR,—I fear that you must have misunderstood my letter in your last issue, as you seem to assume in your editorial remarks that under the Torrens System of Land Transfer the creation of trusts of land is impossible. In this you are mistaken, trusts may be still declared of land, the only difference being that under the Torrens System, third parties dealing with the trustee are under no necessity to enquire into the trusts, or to see to their due execution. In this respect however the same principle is adopted, as now prevails with us so far as bank shares, or stocks, and funds, are concerned.

From the official report of Mr. H. Gawler, one of the solicitors to the land titles department of South Australia, of 29th October, 1880, to the Attorney-General of that Province, it appears that so far from *cestuis que trustent*, being in a worse position under the Torrens System than gentlemen (a professional man of experience) considers that their position is really improved. This is what Mr. Gawler says : “ As to trusts, it appears to me that the question is, do we by virtue of the machinery of the Real Property Act, place *cestui qui trusts* of land in a worse position than they are placed in under the ordinary system? *In my opinion, cestui qui trusts of land under the South Australian Real Property Act are, if anything, in a better position.* The power of caveating, either by themselves or by the Registrar General, or others on their behalf, is ample, and in addition, the insertion of the words “ no survivorship,” in a certificate of title issued to two or more persons as trustees, has been found a most valuable protection to beneficiaries, at any

rate no litigation has occurred on the subject of trusts, nor has any complaint of hardship or difficulty been made to the office."

So far as we can gather from the official reports as to the working of the Torrens System in the Australian Colonies, no real practical difficulty appears to have arisen in regard to trusts.

The system of caveating to which Mr. Gawler refers, is simply the power which is given to persons having interests in lands not appearing on the register, to enter a caveat with the Registrar so as to prevent any transfer or dealing with the land without notice being first given to them, or the order of a court of law being obtained. For the protection of infants, or other persons not *sui juris*, the power to enter such caveats is also vested in the Registrar General.

Thus it will be seen, so far as trusts are concerned, instead of their being abolished under the Torrens System, and everything "sacrificed to the idol of transfer," the result is to put them on a more satisfactory footing, as proper protection is provided for *cestuis que trustent*, and at the same time, third parties dealing with the trustee are relieved from serious legal liabilities and responsibilities, which under the present system in Ontario, are imposed on them. Under our present system a fraudulent trustee may make a conveyance in breach of trust, and his transferee may be liable to answer the trust, relief however being frequently only attainable by means of a law suit, but under the Torrens System it is possible to prevent the transfer being made at all, which is far better protection to the *cestui qui trust*.

Your contemporary, the *Canada Law Journal*, recently drew attention to a bungling piece of conveyancing by some hedge lawyer, and suggested that as a specimen of simple conveyancing it might be deserving of the attention of the advocates of the Torrens System. No doubt a little covert satire was intended, but really your contemporary furnishes a very valuable and important argument in favour of the Torrens System.

Under our present method of registration of deeds, any piece of conveyancing no matter how absurd or ridiculous it may be, can be registered, and it may remain on the register for years before its absurdity and utter failure to carry out the intention of the parties is discovered. No doubt the person who concocted the "conveyance" referred to by your contemporary was fully persuaded that it was all right and in proper legal form, and those who employed him were equally confident that their wishes had been carried out. Notwithstanding all its defects, the deed could be registered, and the title might pass through the hands of several equally accomplished conveyancers, before the defect might be exposed, and in the meantime, the possibility of remedying the defect be increased a hundred fold. Whereas under the Torrens System, all transactions in point of form are subject to the control of a public officer, and if not in proper form they cannot be registered. Under this system defects are at once exposed, and can be cured, by reason of their prompt discovery, without much expense. But under our present system the defects are not discovered in many cases until long after they occur, and the expense of remedying them is then frequently thrown, not on the person creating them, but on some other person whose only fault, or misfortune happens to be, that he has subsequently acquired an interest in the land. The superiority of the Torrens System in this respect is so plain, that I do not see how there can be any reasonable doubt about it.

GEO. S. HOLMESTED.

THE
CANADIAN LAW TIMES.

OCCASIONAL NOTES.

ONTARIO.

Supreme Court of Judicature.

COURT OF APPEAL.

Q. B.]

[11TH DECEMBER, 1883.

VAN VELSOR v. HUGHSON.

Lost deed—Evidence—Memorial signed by grantee—Possession—Knowledge of patentee.

The judgment of the Court below, 45 U. C. R. 252, was affirmed without costs, the plaintiffs having failed at the first trial to prove one of the links in the title set up by them, but which they subsequently established.

Robinson, Q.C., for the appellant.

C. R. Atkinson, for the respondent.

Q. B. D.]

HARVEY v. HARVEY.

Sci. fa.—Irregular judgment against company—Pleading same.

In a proceeding by *Sci. fa.* against the defendant on unpaid shares in the C. S. M. Co., it appeared that the company was incorporated by letters patent under the 32 & 33 Vict. cap. 13 (*D*), sec. 50 of which provides, that

service of process may be made by leaving a copy at the office of the company with any grown up person in charge thereof, or elsewhere with the president or secretary thereof; or if the Company have no known office and no known president or secretary, then upon return to that effect the Court may order service by publication in a newspaper. At the time of the issue of the writ against the company, the plaintiff was vice-president, the president was dead, and the company's affairs had been placed in the hands of the plaintiff and one of the directors to be wound up. S. had been the secretary but his term of office had expired and had not been renewed. He was still, however, in charge of the books of the company. The company had no place of business. The writ was served upon S. who applied to the plaintiff for instructions. None being given, no appearance was entered and judgment was signed by default.

Held, Burton J. A. dissenting, that it was open to the defendant in this proceeding to raise the defence of the irregularity of the judgment by plea, and that it was not necessary that he should have proceeded by motion to the court to get aside the judgment.

Per Burton, J.A. Where a judgment is erroneous or irregular merely, it is binding on every one interested until set aside by motion; this judgment was irregular only and the defendant could not in this proceeding set up the irregularity as a defence; but if the judgment had been fraudulent the defendant might have pleaded the fraud and would not have been bound to move against the judgment.

Per Spragge, C.J.O. and Patterson, J.A. The presenting of an affidavit of service to the court in which it was sworn that the secretary of the company had been served with process, whereby the plaintiff was allowed to sign judgment, when S. was not in fact secretary at the time of service of the process, was a misrepresentation which misled the court, and hence the judgment was obtained by fraud.

C. P.]

PROVINCIAL INS. COMPANY v. WORTS.

Company—Calls—Power of attorney—Forfeiture—Change of corporate name—Advertisements.

The Court being equally divided, the appeal was dismissed with costs, and the judgment of the Court below, 31 C. P. 523; 1 C. L. T. 212, *sub-nom.*, *Prov. Ins. Co. v. Cameron*, affirmed.

Bethune, Q.C., *S. H. Blake, Q.C.*, and *C. R. W. Biggar*, for the appellants.
Robinson, Q.C., and *H. W. M. Murray*, for respondent.

FULTON v. U. C. FURNITURE CO.

Contract by Correspondence.

Held, reversing the judgment of the Court below, 32 C. P. 422, on the facts there stated that there had not been shown a clear assent on both

sides to one and the same set of terms, and that a concluded and binding agreement had not been made out between the parties.

Robinson, Q.C., for the appellant.

F. E. Hodgins, for the respondent.

Boyd, C.]

COURT v. WALSH.

*Mortgagor and Mortgagee—Statute of Limitations—Insolvent Act of 1875—
Effect on running of Statute.*

The judgment of the Court below, 1 Ont. R. 167; 2 C. L. T. 306, was affirmed, Spragge, C.J.O., dissenting, the majority of the Court holding that an assignment under the Insolvent Act of 1875 by an insolvent mortgagor does not stop the running of the Statute of Limitations so as to keep alive the claim of the mortgagee.

Bethune, Q.C., and *Clute*, for the appellant.

MacLennan, Q.C., and *C. R. W. Biggar*, for the respondent.

CROSSFIELD v. GOULD.

Specific performance—Time of the essence of the contract.

The defendant G. agreed to sell to the plaintiffs certain timber limits for \$25,000, stipulating that they should have a certain named time to inspect the property and arrange for payment of the price. Subsequently, and on the 20th August, the plaintiffs wrote to the defendant, excusing themselves for not having carried out the purchase, and asking for an extension of time for their accepting or refusing "your limits; one or two weeks—two weeks if possible." The extended time expired on the 10th of September, and the defendants granted the extension of time to enable them to make their financial arrangements only. The plaintiffs failed to complete the purchase at the time named, and the defendant G. sold to the other defendant M.

Held, affirming the judgment of the Court below, that, looking at the subject of the contract and express limitation of time, the parties, although time was not originally of the essence of the contract, by their correspondence subsequently had made it so, and therefore that the plaintiffs were not entitled to specific performance.

Moss, Q.C., and *Miller*, for the appellant.

S. H. Blake, Q.C., and *W. Cassels*, for the respondent G.

Osler, Q.C., and *Creelman*, for the respondent M.

PROUDFOOT, J.]

CHAMBERLAIN v. CLARKE.

Administration—Deficiency of Assets—Status of creditors—R. S. O. cap. 107, sec. 30.

The judgment of the Court below, 1 Ont. R. 135; 2 C. L. T. 203, was affirmed.

Moss, Q.C., for the appellant.

S. H. Blake, Q.C., for the respondent.

FERGUSON, J.]

KEEFER v. MCKAY,

Will, construction of—Vested estate—Trustee for sale—Partition.

The Court being equally divided, the appeal was dismissed with costs. and the judgment of the Court below, 29 Gr. 162; 1 C. L. T. 611, affirmed.

Bethune, Q.C., and *Gormully*, for the appellants.

MacLennan, Q.C., *S. H. Blake, Q.C.*, *Black* and *Plumb*, for other parties.

BLAKE, V.C.]

THOMPSON v. TORRANCE.

Will by interrogation—Validity of.

The Court being equally divided the appeal was dismissed with costs and the judgment of the Court below, 28 Gr. 253; 1 C. L. T. 279, affirmed.

Robinson, Q.C., for the appellants.

McCarthy, Q.C., *W. Mortimer Clark* and *W. Cassels*, for the respondents.

DIV. CT. MIDDLESEX.]

[SPRAGGE, C.J.O.]

SOUTHAM v. NORCOMBE.

Married woman—Separate estate—Promissory note—Protest—Notice of dishonour.

The defendant, a married woman, was entitled to dower in the lands of a former husband, which had not been set out. After residing on the lands for upwards of sixteen years, she endorsed a note for the accommodation of her son, and to an action thereon she set up that being an accommodation endorser only she was not liable. A verdict having been rendered against her, she moved for a new trial, alleging, in addition to her former defence, want of notice of dishonour. The application being refused, she appealed to this Court, when the ruling of the learned Judge below was affirmed. The production of the protest for nonpayment being

held sufficient *prima facie* evidence of the notice of dishonour, and there being no merits in the other defence sought to be raised.

R. M. Meredith, for the appellant.

C. L. Ferguson, for the respondent.

High Court of Justice.

QUEEN'S BENCH DIVISION.

[THE DIVISIONAL COURT, 7TH DECEMBER, 1883.]

LEVOY v. MIDLAND RAILWAY CO.

Railway Company—Train moving backwards—Stationing man on last car—Negligence.

One of the defendants' trains was moving reversely on its track on a public street, in the town of Lindsay, a brakeman standing at the rear end of the last car. The brake at that end was defective; the brakeman, a few minutes before the accident happened, seeing the track clear, went to the front end of the rear car to brake the car, and while there the plaintiff, a child of six years old, approached the track to cross it, got his foot caught in the rail, and the car passed over it. When he was discovered, the train was stopped by the brake within a car length. The jury found a verdict for the plaintiff. The Railway Act requires the company to station on the last car of a train moving reversely in any town a person who shall warn parties standing on or crossing the track of the approach of the train.

Held, that the company was guilty of negligence, and that the verdict was right, for the stationing of a man at the front end of the rear car where he could not see and warn people off, was not a compliance with the statute.

Held, also, that the jury was properly directed that the company was negligent in having a working brake on the front end only of the rear car, and but one man to work it and warn persons approaching the train.

Hudspeth, Q.C., for the plaintiff.

Bethune, Q.C., and *W. H. Biggar*, for the defendants.

[29TH DECEMBER, 1883.]

HUGHES v. LONDON ASSURANCE CO.

Fire policy—Statutory condition—Reference to arbitration—Staying proceedings.

The decision of *Armour, J.*, 3 C. L. T., 600, was affirmed.

J. B. Clarke, for the appeal.

G. H. Watson, contra.

EDGAR v. NORTHERN RAILWAY CO.

Negligence—Contributory Negligence.

The plaintiffs, husband and wife, were on a train of the defendants going to Lefroy. The conductor, before reaching the station, announced that the next station was Lefroy, knowing that there were passengers for that place. On approaching the station he slowed the train, but did not stop. The husband sprang off while the train was moving slowly, and his wife sprang after him and was injured. It was left to the jury to say whether she had acted imprudently in so doing. They found a verdict for the plaintiffs.

Held, that the question of contributory negligence was properly left to the jury, and the Court refused to disturb the verdict.

Osler, Q.C., for the plaintiffs.

Boulton, Q.C., for the defendants.

BUTTERFIELD v. WELLS.

Solicitor and client—Retainer by assignee under Insolvent Act of 1875—Liability of assignee for costs.

The defendant's testator was a sheriff and official assignee under the Insolvent Act of 1875. The plaintiff was solicitor for the City Bank, and also for one B., upon whose petition G. F. was placed in insolvency. The official assignee became creditors' assignee. At the first meeting of creditors, B. being chairman, the plaintiff representing the City Bank whose claim amounted to nearly the whole indebtedness, moved a resolution whereby it was resolved to sell certain goods of the insolvent; that the assignee should take the necessary proceedings to realize the assets and recover certain property alleged to belong to the insolvent, and for that purpose to retain counsel if necessary. B. became inspector of the estate and consulted with the plaintiff, and on his advice instructed the assignee to defend and bring actions. The assignee was obliged to pay costs and damages in actions brought against him to recover goods wrongfully taken by him, and he also paid the plaintiffs some costs, whereby the assets of the estate were exhausted and a small sum in addition was paid by the assignee out of his own funds. The defendant's testator was subsequently removed from the office of assignee, and a new assignee appointed, whereupon he presented a petition to the Insolvent Court, in which he alleged that he had retained the plaintiff and had been put to great expense in bringing and defending suits as assignee, and had become liable to pay large sums of money in respect thereof, and prayed payment by the new assignee, which was refused. The plaintiff delivered his bills to the defendant's testator in his lifetime. After the death of the testator, the plaintiff wrote to one of his sons about the costs when, in relating the facts, he stated that he was attorney for the bank. He now sued the personal representative for his unpaid costs of the proceedings carried on by him. *Senkler, Co. J.*, who tried the case found that the retainer was not a personal

one by the assignee, but that the plaintiff had acted for the benefit of the creditors, and was in fact their solicitor.

Held, Armour, J., dissenting, affirming the judgment of Senkler, Co. J., that it was a question to be determined on the evidence whether the retainer was a personal one by the assignee, or whether he was acting merely on the instruction of the creditors; that upon the evidence the plaintiff was solicitor for the creditors and not for the assignee personally, and notwithstanding the admission contained in the assignee's petition, he had not incurred any personal liability for the costs.

Per Armour, J. The presumption is that when a solicitor is retained, the person retaining him is liable for the costs, and to avoid liability he must show some special agreement to the contrary. The evidence here not only did not displace this presumption, but showed that the testator had always considered himself liable for the costs.

Per Hagarty, C.J. It is the duty of a solicitor to inform his client as to the advisability of taking proceedings and incurring costs when it may become a question whether the costs will have to be paid out of his private funds or out of a trust fund or estate.

Bain, Q.C., for the appeal.

Moss, Q.C., contra.

SHANLY v. GRAND JUNCTION RAILWAY CO.

Contract of hiring—Limitation of actions—Evidence—New trial.

The plaintiffs' testator was chief engineer of the defendant Company, from its inception until an agreement made by the company with one B., who was to finish the construction of the road, paying all expenses, etc., including the engineer's salary. In 1881 the testator wrote a letter to the solicitor for the G. T. Railway Co., which company was about to assume the control of the defendants' railway, claiming for services rendered the defendant company up to the middle of 1875. The action was commenced in February, 1882, for services rendered from November, 1871 to 1875. At the trial an amendment was made allowing the plaintiff to claim for services rendered up to 1880. It appeared that the testator was to have had a salary, but the amount was never fixed. During the time, from 1875 to 1880 or 1881, he performed services as engineer for the defendant company, certifying to work done that the company might obtain bonuses, attending meetings and deputations; he also approved of plans of a bridge submitted to him, and in 1878 signed the specifications appended to the contract between the company and B.

Held, Hagarty, C.J., dissenting, that there was no evidence to go the jury of a continuing employment of the testator subsequent to 1875, and of services rendered as chief engineer within the six years preceding action, notwithstanding the letter written by the testator claiming for services up to 1875 only; and that any inference to be drawn from the writing of this letter was for the jury and not for the judge to draw, and a new trial was ordered.

Per Hagarty, C.J. The evidence showed that the testator, though nominally chief engineer of the defendant company subsequent to the contract with B., was in fact working for B., to whom he looked for payment. The effect of letters written by the company's president, after the original claim had been barred, discussed, as to their sufficiency to revive the claim.

Read, Q.C., and Walter Read, for the plaintiff.

McCarthy, Q.C., Delamere, and W. H. Biggar, for the defendants.

REGINA v. WALLACE.

Canada Temperance Act, 1878—Conviction—Certiorari—Prior conviction.

Held, Cameron, J., dissenting, that section 111 of the Canada Temperance Act, 1878, takes away the right to certiorari in all cases except cases of want or excess of jurisdiction, and that it applies to convictions for all offences against the preceding sections of Part II. of the Act, and does not relate merely to offences against section 110.

Per Hagarty, C.J., and Armour, J. An erroneous finding on the evidence by the Magistrate is not such a want of jurisdiction as warrants the issue of a certiorari.

Per Cameron, J. There was no evidence of the commission of the offence charged in this case, and therefore the magistrate acted without jurisdiction, and a certiorari would lie.

Per Armour, J. The omission of the Magistrate to ask the accused whether he had been previously convicted did not deprive him of jurisdiction to receive proof of the prior conviction. The allegation in the conviction that the offence was committed between the 30th June and the 31st July, was a sufficiently certain statement of the time.

Delamere for the Crown.

Aylesworth, for defendant.

WATERLOO MUTUAL INS. CO. v. ROBINSON.

Evidence—Collateral matters—Admissibility of—Pleading—Silence of party as to material fact alleged by opposite party.

In an action on a bond against two sureties, the defendant R. set up the defence and gave evidence that his signature to the bond had been obtained by fraud. The evidence of his co-defendant C. was tendered for the purpose of showing that C.'s signature to the bond had also been so obtained, which was rejected as inadmissible.

Held, that the evidence of C. was admissible as showing a fraud practised on him with respect to the same instrument by the same person and at or about the same time as the alleged fraud on R., and because it was confirmatory of his evidence; and a new trial was ordered.

Per Armour, J. When a material fact is alleged in a pleading, if the opposite party is silent with respect thereto, the fact must be considered as in issue. Therefore it was competent for C. to deny the execution of the bond, his pleading not expressly admitting it.

W. H. Bowlby, for the plaintiff.

R. M. Meredith, for the defendant.

LIGHTBOUND v. WARNOCK.

Principal and surety—Promise in writing—Sufficiency of.

F. being indebted to the plaintiffs, who were pressing him for payment, the defendant signed the following document and delivered it to the plaintiffs in consideration of their giving time to F:—"I will guarantee that the security offered by Mr. John Fleming for the balance of your account will be executed and forwarded within ten days." The security referred to was a mortgage upon real estate, to be executed, and a paid-up life policy for \$5,000, which F. had agreed verbally to give to the plaintiff; neither of which existed at the time of F.'s agreement, or the defendant's guaranty. F. never gave security, and the plaintiffs, by refraining from suing him, lost their debt.

Held, affirming the judgment of Burton, J.A., Hagarty, C.J., dissenting, that the writing signed by the defendant was not sufficient to satisfy the 4th section of the Statute of Frauds, whether regarded as an original promise or a guaranty.

Per Hagarty, C.J. The guaranty is divisible. The writing was not sufficient as to the mortgage of real estate, because the promise of the debtor himself was not enforceable against him, not being in writing; but as to the policy, the writing was sufficient.

Osler, Q.C., for the appeal.

MacKelcan, Q.C., contra.

REGINA v. BERRIMAN.

Lord's Day Act—The public service.

Held, that R. S. O. cap. 189, which forbids the profanation of the Lord's Day by persons carrying on their ordinary business, does not apply to persons in the service of Her Majesty; and therefore the conviction of a lock-tender on the Welland Canal for the locking a vessel through the Canal on Sunday, in obedience to his superior, was quashed.

H. J. Scott, for the defendant.

J. R. Cartwright, for the Crown.

McClive, for the private prosecutor.

In re CLARKE v. McDONALD;

FLETT & BRADLEY, *Garnishees*.

Division Courts Act—Garnishee proceedings—Notice disputing jurisdiction filed too late—Prohibition—High Court procedure.

Held, affirming the judgment of Armour, J., that where a garnishee does not file a notice disputing the jurisdiction of a Division Court within the time required by 43 Vict. cap. 8, sec. 14, though no objection can be taken to the jurisdiction of the Division Court in that Court, the jurisdiction of the High Court of Justice to prohibit the proceedings is not ousted.

The garnishees, though partners, resided in different places out of the jurisdiction of the Division Court, and but one of them was served. No order was made dispensing with service on the other. The learned Division Court Judge gave judgment against both in their absence.

Per Armour, J. The prohibition might be supported on this ground also. R. S. O. cap. 47, sec. 134 construed.

The Judicature Act does not apply to a case of this kind, the proceedings of which are specially provided for in the Division Courts Act.

Lask, Q.C., for the appeal.

Aylesworth, contra.

[WILSON, C.J., 4TH DECEMBER, 1883.]

HYNES v. FISHER.

Master and servant—Intimidation of servant—Injunction—Suppression of facts on motion ex parte for injunction—Dissolving injunction on motion to continue.

On a motion to continue an injunction, the defendant may bring forward such facts as he might if he were moving to dissolve the injunction, and may show suppression of facts by the plaintiff as a ground for dissolving it, and may therefore move to dissolve it.

On a motion to dissolve an injunction, the notice should show the grounds upon which the motion is proposed to be made.

Some of the defendants, by threats, intimidation and violence, prevented one M., who had contracted to work for the plaintiff, from fulfilling his contract, and induced him to leave Toronto, where he had been hired to work, whereby his master suffered injury to his business.

Held, that this entitled the master to an injunction restraining these defendants from so interfering with his servants.

It appeared that previous to the intimidation four workmen had struck work with one W., a member of an association called the Master Plasterers Association, of which the plaintiffs were members, because W. had refused to pay one of his workmen the wages demanded for him by them. Thereupon, the plaintiffs' association passed a resolution imposing a fine on any

of its members who employed the four striking workmen, and communicated this to the defendants' association, called the Operative Plasterers' Association. The latter demanded the rescission of the resolution, and in default notified the plaintiffs' association that the workmen would strike. The resolution was not rescinded, and the workmen struck. The intimidation complained of by the plaintiff followed as a consequence.

Held, that the defendants, by showing the fact of the resolution of the plaintiffs' association, which the plaintiffs had not divulged on their motion *ex parte* for the injunction which they now moved to continue, were entitled to have the injunction dissolved.

Held, also, upon the merits, that the plaintiffs were not entitled to the injunction on account of their resolution.

S. H. Blake, Q.C., and *O'Sullivan*, for the plaintiffs.

Osler, Q.C., and *Fullerton*, for the defendants.

HYNES v. FISHER.

MCCORD AND JENKINS' CASE.

Injunction—Interference with process—Contempt of Court—Parties suing in representative capacity.

Pending the injunction in this case, one P., who was not a party to the action, but was a member of the plaintiffs' association, hired, on behalf of the association, one H. to work for him. McCord and Jenkins, members of the defendants' association but not parties to the action, hearing of it, went to H. and induced him to refuse to work for P. and to leave Toronto. The Court was of opinion that McCord and Jenkins had notice and knowledge of the injunction pending at the time. The plaintiffs did not state by their writ that they sued in any representative capacity or otherwise than in their individual rights, nor did they sue the defendants in a representative capacity; but the plaintiffs' affidavits stated that the plaintiffs represented their association, and the defendants theirs. A motion was now made to commit McCord and Jenkins for contempt of process of the Court.

Held, that the Master Plasterers' Association was not made a party to nor sufficiently represented in the action by the allegation in the plaintiffs' affidavits; and that no acts against the plaintiffs individually having been established, McCord and Jenkins could not be held guilty of contempt for interference with the association and P., and though the association might be added by amendment, the injunction would also have to be amended, and in the meantime McCord and Jenkins would have to be acquitted of contempt of the injunction as it now stood, and therefore the motion must fail.

COMMON PLEAS DIVISION.

[15TH DECEMBER, 1883.]

HUGHES v. HAND-IN-HAND INS. CO.

Fire Insurance—Policy—Statutory condition—Arbitration—Stay in proceedings.

The judgment of Armour, J., 3 C. L. T. 600, was affirmed.

Counsel for defendant then offered to admit liability on the policy and refer the amount of the loss to arbitration. Upon this, the Court stayed the proceedings and ordered that the plaintiff should be at liberty to enter judgment for the amount awarded if not paid within three weeks from the making of the award.

J. B. Clark, for the appeal.

G. H. Watson, contra.

[24TH DECEMBER, 1883.]

OATES v. INDEPENDENT ORDER OF FORESTERS.

Friendly Society—Insurance—Suspended Court—R. S. O. cap. 167, sec. 11—Amendment—Pleading.

O. was a member of Court Maple of the Independent Order of Foresters, and under the endowment provisions was insured in the Order for \$1,000. This Court left the Order as a body, and joined another Order called the Canadian Order of Foresters, and the Court was in consequence suspended. Part of the agreement in joining the Canadian Order was that O., who was in ill-health, and had gone to California for change, should be taken and insured with the others. By the rules it was provided that members of suspended Courts, who were in good standing at suspension, should on application within thirty days to the supreme secretary, and payment of a fee of \$1, receive a card of membership from and be entitled to the endowments provided they paid all assessments as they fell due, and affiliated with another Court; but if after thirty days, they must pass a medical examination. O. on returning from California, being then in good standing, on ascertaining that the Court Maple had been suspended, and within the thirty days after suspension, applied to the supreme secretary of the Independent Order for a card of membership, tendering \$1 and all assessments due, but the card was refused without the production of a medical certificate; he also endeavoured to affiliate with another Court, but was prevented doing so by reason of his not having a card. By the certificate of endowment the \$1,000 was payable to the widow, orphans, or legal heirs of O., and by endorsement thereon O. directed the amount to be paid to the plaintiff, his widow.

Held, that under the directions so given, as well as under R. S. O. cap. 167, sec. 11, the widow was entitled to recover the amount, and that the

fact of O. being a member of another order did not, *ipso facto*, deprive him of his rights and membership of defendants' order.

At the trial an amendment was asked for to set up a forfeiture of the policy by reason of O.'s having gone to California without a permit, which was refused.

Held, under the circumstances that the refusal was proper.

Quare, whether the way, cause, and manner in and for which O. and the other members of Court Maple left it and formed in a body another order might not, if properly pleaded, have required some consideration.

The frame and effect of the pleadings in this case considered.

R. M. Meredith, for the plaintiff.

Osler, Q.C., for the defendants.

NOLAN v. DONNELLY.

Chattel Mortgage Act—Assignment for benefit of creditors—Description of goods.

In an assignment for the benefit of creditors the description of the goods and chattels assigned was as follows:—"All and singular the personal estate and effects, stock in trade, goods, chattels, rights and credits, fixtures, book debts, etc., and all other personal estate and effects whatsoever and wheresoever, and whether upon the premises where said debtors' business is carried on, or elsewhere, and which the said debtors are possessed of or entitled to in any way whatsoever, including among other things, all the stock in trade, goods and chattels which they now have in their store and dwellings in the village of Renfrew aforesaid; also all and singular their personal estate and effects of every kind and nature, etc."

Held, not a sufficient description to satisfy the Chattel Mortgage Act.

Delamere, for the plaintiff.

Moss, Q.C., for the defendant.

PATTERSON v. McKELLAR.

Fi. fa. goods—Delivery to sheriff—Sale by execution debtor—Right of sheriff to goods.

The defendant, the sheriff of Wentworth, received, on 11th January and 15th February respectively, executions against the goods of M., under the first of which he made a formal seizure leaving no one in possession, and the execution debtor remained in possession and carried on his business as before the seizure. On the 6th March the goods were sold by the debtor to the plaintiff, who removed them to his own place of business. On 22nd March the sheriff seized all the goods then in the plaintiff's possession, which he had received from the execution debtor, as also certain goods of the plaintiff which he claimed to take in lieu of goods bought by the plaintiff

from the execution debtor and sold by him. The sale to the plaintiff was found to be *bond fide* and for value, and without notice of the executions. In replevin for the goods,

Held, Wilson, C.J. dissenting, that the sheriff was entitled to the goods of the execution debtor then in the plaintiff's possession, but not to the goods of the plaintiff taken by the sheriff in lieu of those sold by the plaintiff.

When the sheriff made the seizure on 22nd March, the plaintiff gave him an undertaking against damages for all goods sold by him thereafter, if the sheriff should be held entitled to the goods.

Held, on a counter-claim setting up this undertaking that the sheriff was entitled to recover the value of the goods sold by the plaintiff after the 22nd March, and before the issue of the writ of replevin.

E. Martin, Q.C., for the plaintiff.

Osler, Q.C., for the defendant.

In re MEEK v. SCOBLE.

Division Court—Claim for damages and debt—Damages above jurisdiction—General abandonment—Prohibition.

The judgment of Wilson, C.J., 3 C. L. T. 594, was affirmed.

Meek, in person, for the appeal.

A. C. Galt, contra,

BOTHWELL ELECTION CASE.

Contempt of Court.

The petitioner, pending an election petition filed by him, in which the conduct of the Returning Officer at the election was complained of, published in his newspaper articles reflecting on the respondent and the Returning Officer. The respondent applied for an order *nisi* calling on the petitioner to show cause why he should not be committed for contempt of court, and made out a *prima facie* case of contempt. It appeared, however, that the respondent had attended and spoken at a meeting held for the purpose of approving of the conduct of the Returning Officer, and presenting him with a watch as a mark of such approval.

Held, that the applicant was also in fault, and that the application should therefore be refused.

H. T. Beck, for the motion.

FORGEY v. GRAND JUNCTION RAILWAY CO.

Railway Company—Amalgamation—Enforcing decree obtained prior to amalgamation.

Part of the consideration for the right of way over the plaintiff's land was that the B. & N. H. Railway Co. should construct a cattle pass under their railway for the use of the plaintiff. The company refused to construct the pass, and the plaintiff on 30th April, 1880, filed a bill to enforce the agreement, which the company answered on the 13th September, 1880; and on 13th November, 1880, a decree was made by consent, directing the company to erect the pass on certain terms. In March, 1879, the Act 42 Vict. cap. 53 (O.) was passed authorizing the B. & N. H. Railway Co. to enter into a deed of amalgamation with the defendants, or any other railway company, subject to the ratification and approval of a majority of the shareholders. On the same day a similar Act 42 Vict. cap. 57 (O.) was passed authorizing the amalgamation of the defendants with the B. & N. H. Railway Co. On 29th June, 1880, a deed of amalgamation was entered into between the two companies under the defendants' name, which was on the same day ratified and approved by the shareholders. By the terms of the deed certain clauses of the Imperial Railway Clauses Act of 1868, 26 & 27 Vict. cap. 92, under the heading, "Amalgamation," were incorporated therewith. Sec. 42 of that Act provides that causes of action arising before amalgamation shall be valid and effectual against the amalgamated company; and sec. 43, that suits pending against the dissolved companies shall be continued against the amalgamated company. The plaintiff had no notice or knowledge of the deed of amalgamation or of its contents. On 4th March, 1881, the Act 44 Vict. cap. 64 (O.) was passed, by sec. 1 of which the deed of amalgamation was declared legal and valid, and it was enacted that the two companies should be amalgamated and united under the said defendants' name in the terms of the said deed. The terms of the decree not having been carried out, the plaintiff brought this action against the defendants to enforce it.

Held, that there was no complete amalgamation of the two companies until the passing of the 44 Vict. cap. 64 (O.) so that the B. & N. H. Railway Co. had not ceased to exist when the decree was made, and that it was therefore valid; and that the plaintiff was entitled to enforce it against the defendants.

Dickson, Q.C., for the plaintiff.

Moss, Q.C., for the defendants.

[OSLER, J.]

UNION INSURANCE CO. v. O'GARA.

UNION INSURANCE CO. v. SCHOOLBRED.

Corporation—Calls—Resolution—By-law—Notice—Stockholder—Change of head office.

The plaintiffs' Act of incorporation provided that the directors could make calls at such times as they might deem requisite, provided that

successive calls should be made at intervals of not less than two months between such calls, and that no call should exceed ten per cent., and that thirty days' notice should be given of every such call.

Held, that it was not necessary that calls should be made by by-law, but that a resolution was sufficient for the purpose; and that the resolution need not name the place of payment of the call, but that this could be done in the notice.

A resolution was passed by which a call was made of ten per cent., payable on the 1st March; and it was thereby further resolved that a further call of ten per cent. should be made payable on 1st September.

Held, not to be a call of twenty per cent., but two calls of ten per cent. each; and the fact that the second call was illegal did not invalidate the first call because contained in the same resolution.

The company's Act provided that the head office of the company could be changed to such other place as might be determined by the shareholders at any one of the general meetings. At an annual general meeting a resolution was passed authorizing the directors to consummate arrangements for the removal of the head office from Ottawa to Toronto. The directors made the change, and the subsequent annual meetings were held at Toronto, at the first of which so held the by-law referring to the place of holding the annual meetings was amended by substituting Toronto for Ottawa.

Held, that the change was effectually made.

Union Ins. Co. v. Fitzsimmons, 32 C. P. 602, followed as to notice of calls.

Foster and J. B. Clarke, for the plaintiffs.

J. K. Kerr, Q.C., for the defendants.

THE CORPORATION OF WELLAND v. BROWN.

Principal and surety—Collector's Roll—Certificate—Entries on Roll—Evidence—Commission.

In an action against sureties for a town collector, for his default in not paying over the taxes collected by him,

Held, (i) that it is not necessary that the roll should be certified, but it is sufficient if it be signed by the town clerk; (ii) that entries made by the collector on his roll, in the discharge of the duties of his office, of taxes paid, are evidence in an action against his sureties.

The jury, without any evidence to justify such finding, allowed the collector a commission of three and a half per cent. on the taxes collected by him.

Held, that this amount could not be allowed, and that the verdict against the sureties must be increased by that amount.

Lash, Q.C., for the plaintiffs.

Osler, Q.C., for the defendants.

REGINA v. FLINT.

Keeping house of ill-fame—Evidence—32-33 Vict. cap. 32 (D), construction of—Nature of offence.

On an application to quash a conviction made by the police magistrate of the city of Toronto against the defendant for keeping a house of ill-fame, there being evidence upon which the magistrate could convict, the court refused to interfere.

In the conviction the offence was stated to be against the statute in such case made and provided.

Held, that the reference to the statute might be supported because the 17th section imposes a punishment in some respects different from the punishment at common law; but if the statute did not constitute the keeping such a house an offence, the reference to the statute might be treated as surplusage.

Bigelow, for the prisoner.

Fenton, for the Crown.

McPHERSON v. GEDGE.

Mechanics' lien—Lien holder not party to action—Enforcing lien after dismissal of action.

Held, Galt, J., dissenting, that a registered lien holder under the Mechanics' Lien Act, who has not commenced an action in his own right, either singly or along with other lien holders, can in an action brought by other lien holders which proceeded to the close of the pleadings, set aside the dismissal of that action, which the plaintiffs therein had assented to and prosecute it for his own benefit.

F. E. Hodgins, for the applicant.

Langton, for the defendants.

In re JARRARD.

Extradition—Public book—Evidence—Alteration—Forgery—Extradition Act of 1877—45 Vict. cap. 25 (D)—Construction of.

The prisoner, who was collector of the County of Middlesex, in the State of New Jersey, kept a book for the entry of the payment and receipt of all moneys received by him as such collector, and which was the principal book of account kept by him. The book was purchased with the money of the County, and was kept in the collector's office, and was left by him at the close of his term of office; it was open to the inspection of those interested in it and contained the certificate of the County officials as to the matters therein contained.

Held, that the book was the public property of the County, and not the personal property of the prisoner. After the book had been examined by the proper County officers for that purpose as to the amounts received and paid out by and through the prisoner as such collector, and a certificate of the same made by them, the prisoner, who was a defaulter, with intent to cover up his defalcation, altered the book by making certain false entries therein.

Held, that this constituted forgery at Common Law, as well as under 32-33 Vict. cap. 19.

Held, also, that under the Extradition Act of 1877, 40 Vict. cap. 25, it is essential that the offence charged should be such, as if committed here, would be an offence against the laws of this country. The offence was also proved to be forgery against the laws of New Jersey.

Osler, Q.C., for the prisoner.

E. Martin, Q.C., and *Fenton*, contra.

DEVANNEY *et al.* v. DORR.

Assessment—Taxes, when due—Agreement—Arbitration—Costs.

Under the Assessment Act, the assessment is for the purpose of designating the person to be charged, but no debt is due until the rate on the dollar is imposed, and the amount of taxes thus ascertained and fixed.

By an agreement, dated 4th November, 1881, between one Q. and the defendants for the sale of Q.'s business, after reciting that the defendants were to pay, satisfy, and discharge all liabilities now due and owing, or hereafter to become due and owing, incurred by the said Q. in the said business, etc., the defendants covenanted to pay, satisfy and discharge all the debts, dues, and liabilities, whether due or accruing due, contracted by the said Q. in connection with said business, etc. Q. was assessed for goods sold under the agreement before the making thereof, but the rate was not imposed until May thereafter.

Held, that this was not a debt, etc., contracted in connection with the business so as to come within the agreement.

By an order of reference, the arbitrator was empowered to certify and amend pleadings and proceedings, and otherwise as a Judge at *Nisi Prius* might do, and the costs of the reference, arbitration, and award, were to abide the result of the award.

Held, that the arbitrator had no power to make any disposition of the costs as they were provided for by the order of reference.

McClive, for the plaintiff.

Aylesworth, for the defendants.

CHANCERY DIVISION.

[BOYD, C., AND FERGUSON, J., 12TH DECEMBER, 1883.]

HAMILTON P. & L. CO. v. CORNELL.

Misrepresentation—Death of party making representation—Liability of administrator.

G. and M. dissolved partnership in August, 1879, and the land in question was held by G. as a security for a lien of \$525 to be paid to him by M. M. then devised the scheme to sell the land to C. for \$2,250, so as to defraud any Loan Company which would advance \$1,125 upon the land. In order to carry this out the \$1,125 was to be paid by stripping the land of timber and paying the proceeds to M., who was to get the \$1,125 to be lent upon it. M. drew up a receipt for G. to sign in the following words:—"Received from A. C. \$1,150 worth of lumber and timber in part payment on lot No. 26, the said lumber and timber to become the property of M. in part settlement with him. February 19th, 1880." Application was made to the plaintiffs for a loan of \$1,125 on 29th March, 1880. G. then executed a deed of the land in which the consideration was put as \$2,250, which was deposited with G.'s solicitor as an escrow to be delivered on payment of \$525. G. died on 10th April, 1880, to the knowledge of the Company. On 28th June, the receipt signed by G. was, at the request of the plaintiffs' solicitors, sent to them. The proceeds of the loan were advanced in July following, out of which G.'s administrator received the \$525.

Held, that, no cause of action having arisen in G.'s lifetime, an action of deceit would not lie against his administrator.

Held, also, that if the plaintiffs desired to repudiate the transaction they should replace G.'s administrator in his former position as to his securities.

[PROUDFOOT AND OSLER, JJ., 6TH DECEMBER, 1883.]

HESPELER v. BECK.

Action in Chancery Division—Trial before jury—Motion for new trial.

This action was in the Chancery Division, but was tried at the Berlin Assizes before a jury.

Held, that a motion for a new trial must be made by moving for an order *nisi*, and not upon notice of motion.

H. C.

[THE CHANCELLOR, 21ST NOVEMBER, 1883.]

ALLAN v. LYON.

Copyright—Assignment—Infringement—Acquiescence—Damages beneath the dignity of the court—Costs.

To create a perfect right under 38 Vict. cap. 88 (D) Statutes of Canada, 1876, p. xvii., there should be an assignment in writing of such parts of the book as the owner of the copyright therein is willing to permit his licensee to publish; but without any writing there may be such conduct on the part of the owner as disentitles him to relief in equity by way of injunction.

The plaintiff was aware of the defendant's intention to publish what was now complained of, in pursuance of an assent given by the plaintiff, who encouraged the defendant in so doing. The plaintiff's damages were estimated at about \$20.

Held, (i) that the plaintiff by his conduct had disentitled himself to an injunction; (ii) that the amount was beneath the dignity of the court; and the action was dismissed with costs to the defendant on the lower scale.

[21ST DECEMBER, 1883.]

McKAY v. HOWARD.

Mortgage—Printed and written instrument—Construction of.

A mortgage made pursuant to the Act respecting short forms of mortgages, and drawn upon a printed form, contained in print the usual statutory distress clause. It contained also in writing a clause whereby it was agreed that the mortgagee should look to the land alone for his mortgage money, which preceded the distress clause. The defendant distrained upon the plaintiff for interest overdue, and the plaintiff paid the amount under protest, and brought this action to recover it.

Held, that in the construction of the mortgage the written clause whereby the mortgagee was to look to the land only for his money controlled the distress clause (i) because it preceded it in the mortgage, (ii) because being inserted in writing it must be taken to have been selected by the parties to more correctly express the meaning of their contract than the printed form would.

[PROUDFOOT, J., 22ND NOVEMBER, 1883.]

PARADIS v. CAMPBELL.

Will, construction of—Heirs—Children.

A testator by his will, made in 1843, devised land to his wife for life, and at her decease to be disposed of by his executors as follows:—One-third to

his sister E. her heirs and assigns, one-third to his sister C. her heirs and assigns, one-third to the lawful children of his sister H. their heirs and assigns. In case either or both of his sisters E. or C. should die before him, then each of their portions to be "divided between their, and each of their heirs share and share alike, *i. e.*, each sister's share to each sister's children, to them, their heirs and assigns forever." The testator died in 1847. C. died in 1843 leaving children who survived the testator, and having had a daughter Henrietta, who married Hoffman, and died in 1837, leaving a son Henry Hoffman. The life tenant died in 1874.

Held, that the word "heirs" used in the devise to heirs on the death of the testator's sisters must be taken in its colloquial sense of "children," that "children" meant the immediate offspring of the deceased sister, and therefore that Henry Hoffman took nothing.

Walkem, Q.C., for the plaintiff.

Arnoldi, for the adult defendant.

Plumb, for the infant defendant.

[OSLER, J., 17TH NOVEMBER, 1883.]

WILSON v. WILSON.

Will—Construction of—Dower—Election.

A testator devised his farm to his sons, charged with legacies and with an annuity to the plaintiff, his widow. He also bequeathed to her his household furniture, a cow, and the use of two rooms in the house on the farm for lifetime, and that she should be provided with a horse and carriage by the defendants when she required them, and firewood. The estate was of sufficient value to answer the legacies, annuity, and also the widow's dower.

Held, that she was not put to her election.

IN CHAMBERS.

[WILSON, C.J., 20TH SEPTEMBER, 1883.]

GRANT v. GRANT.

Sheriff's fees—Payment of rent—Taking stock—Possession money—Appeal from local taxing master—Rule 447.

Writs of execution had been placed in the hands of the sheriff of Hastings, under which he made a levy on goods in Belleville and Madoc, leaving them in the premises in which he found them. After the levy and while the goods were in the debtor's premises an instalment of rent fell due which was paid by the sheriff.

Held, reversing the ruling of the taxing master at Belleville, that this payment should not be allowed to him because the goods might have been removed by him before the rent fell due, and there was nothing in the debtor's lease to accelerate payment of rent on seizure of his goods.

The sheriff paid persons both at Belleville and Madoc for taking stock after the levy.

Held, reversing the ruling of the taxing master, that these payments should be disallowed as they do not appear in the tariff and that he was precluded by R. S. O. cap. 66, sec. 51 from allowing anything to the sheriff which was not correct and legal.

It appeared that the deputy sheriff kept the keys of the place in Belleville, where the goods under seizure lay, and went himself twice a day to see that they were safe. He was paid by the sheriff \$2 *per diem* as and for possession money, which was allowed by the taxing master.

Held, that this item should be referred back to the master for reconsideration, the same to be allowed only if he were satisfied that it was actually and necessarily paid.

The sheriff charged poundage upon each of the several writs placed in his hands, all of which were issued by the same solicitor, and all placed in his hands at the same time.

Held, that he was entitled to poundage on each writ.

The plaintiff having applied to a Judge in Chambers to review the taxation of the local master, it was objected that Rule 447 had not been complied with.

Held, that the plaintiff's application was right pursuant to R. S. O. cap. 66, sec. 52, and that Rule 447 applies only to taxations before the taxing officers at Toronto appointed under Rule 438, and not to the local taxing masters.

W. H. P. Clement, for the appeal.

Aylesworth, contra.

[PROUDFOOT, J., 28TH NOVEMBER, 1883.]

WEBSTER v. LEYS.

Married woman—Next friend—Judicature Act—Pending business.

On demurrer it had been held that the plaintiffs, married women, must sue by next friend. A next friend was accordingly joined, and a decree was made on 14th June, 1881. The next friend became insolvent, and the defendant applied for a stay of proceedings until a new next friend had been joined, and the Master in Chambers directed a stay.

Held, affirming the order of the Master in Chambers, that, though by Rule 97 married women may now sue without a next friend in cases relating to their separate estate, yet, a decree having been made in this cause, it should under Rule 494, proceed according to the former practice of the Court of Chancery which required a next friend.

Black, for the appeal.

Kingsford, contra.

[CAMERON, J, 14TH DECEMBER, 1883.]

MONTEITH v. MERCHANTS' BANK.

MONTEITH v. DOMINION BANK.

Administration proceedings—Staying proceedings against estate.

Actions brought by Wm. Monteith in his lifetime. The defendants counter-claimed. After the death of the original plaintiff, his administrator, finding the estate involved, obtained an order for administration from the Chancery Division. The defendants were proceeding upon their counter-claims.

MacGregor, now moved to stay proceedings on the counter-claims on the ground that all claims against the estate can be sufficiently dealt with in the administration proceedings.

J. F. Smith, for the Merchants' Bank.

W. Nicholas Miller, for the Dominion Bank.

Held, that the proceedings should be stayed, the claims to be proved in the administration proceedings; costs to be costs in the cause.

Bailey v. Monteith, 3 C. L. T. 599, approved.

[THE MASTER IN CHAMBERS, 29TH NOVEMBER, 1883.]

McLAREN v. STEPHEN.

Action upon appeal bond—Pending appeal to Privy Council—Staying proceedings.

An action against the sureties upon a bond given by the defendants in the action of *McLaren v. Canada Central Ry. Co.*, upon the appeal of the defendants to the Court of Appeal in that cause. The defendants in that case having appealed from the Court of Appeal to the Judicial Committee of the Privy Council, in that appeal security had been given and allowed, including security for the whole amount recovered by the plaintiffs, and execution was thereupon stayed.

Held, that proceedings must also be stayed in this action.

W. H. P. Clement, for the plaintiff.

Holman, for the defendants.

[30TH NOVEMBER, 1883.]

KELEHER v. MCGIBBON.

Entry of judgment—Interest.

In endorsing a writ of execution to levy interest upon the amount of the judgment, the interest is to be computed from the day of pronouncing the judgment, not from the day of the formal entry thereof.

Rules 326 and 351 O. J. A. are not inconsistent; the "time when the judgment was entered up," in the latter Rule means "the day on which such judgment is pronounced" in the former.

Ogden, for the plaintiff.

W. H. P. Clement, for the defendant.

[12TH DECEMBER, 1883.]

HUGHES v. LONDON ASSURANCE CO.

Motion for stay of proceedings—Delivery of statement of claim—Irregularity.

After the order of Armour, J., 3 C. L. T. 600, the plaintiff delivered his statement of claim. In the meantime, the defendants had given notice of appeal from this order, and the appeal was pending before the Common Pleas Division.

J. B. Clarke, for the defendants, moved to set aside the statement of claim for irregularity, on account of its delivery pending the motion in appeal for a stay of proceedings.

G. H. Watson, contra.

Held, that a stay is necessarily imposed pending a judgment on a motion to stay proceedings, and an order was made staying further proceedings pending the motion.

EVERINGHAM v. EVERINGHAM.

High Court action—Trial at County Court.

This action was for a sum alleged to be due for board and for work done. The defendant counter-claimed for damages for breach of covenants in a lease, and for wrongful ouster of the defendant from the possession of the demised premises.

W. H. P. Clement, for the plaintiff, moved for an order that the action be tried at the ensuing sittings of the County Court at Welland, pursuant to R. S. O. cap. 49, sec. 31, s-s. 3.

Aylesworth, contra.

The MASTER IN CHAMBERS refused the order, holding that, although the plaintiff's claim was within the meaning of the words "any action for any debt," the counter-claim was not, and therefore the whole action could not be tried in the County Court.

FISHER v. McWILLIAMS.

Misrepresentation—Particulars.

Action for the price of stock in an incorporated company sold by the plaintiff to the defendant, which the defendant refused to accept for the reasons alleged in his statement of defence. The plaintiff before and at the time he sold the stock to the defendant, was manager of the company in question. The defendant, after stating this in his defence, alleged that the plaintiff had induced him to agree to buy the stock by means of misrepresentations, fraudulently made to him, namely, by representing to him that the capital stock of the company was unimpaired; that no losses had been made; that the business of the company was succeeding; and that large orders were being taken for the manufacture of the goods made by the company, and that these representations were untrue, for that the company had suffered losses and the capital stock had become impaired; that the company was not doing a successful business; that many of the orders for goods, which the plaintiff represented the company had received were fictitious orders, and had been entered on the company's books by or at the instigation of the plaintiff, in order to make it appear that the company was prosperous. The defendant had been examined in the cause but the plaintiff was not satisfied with the result.

E. H. E. Eddis, for the plaintiff, moved for an order for particulars of the fraud set up by the defendant.

Foster, showed cause, and contended that the defence specified particularly enough the several misrepresentations made by the plaintiff to the defendant, which were the only matters as to which particulars could be ordered; as to the untruth of these misrepresentations, namely, the facts of losses, impairment of capital, and entry of fictitious orders, these were facts peculiarly within the knowledge of the plaintiff, and as to which he did not require particulars.

THE MASTER IN CHAMBERS, 19th December, 1883, refused the order.

STEVENS v. BUFTON.

Action to perpetuate testimony—Joinder of claim for relief.

An action to perpetuate testimony, in which the plaintiff joined a claim for relief as to a certain conveyance which he asked to have declared fraudulent.

Hoyle, for the defendant moved for an order to take the writ and proceedings off the files on the ground that no affidavit accompanied the statement of claim or to strike out of the statement of claim all allegations, and all claim for relief, not relating to and founded on the perpetuation of the testimony sought. The requisite affidavit having been filed pending the motion, it was accepted as sufficient, and he now asked for the amendment of the statement of claim. He argued that if there were any present ground for relief there would be no necessity for the perpetuating of the

testimony, that being a *quia timet* proceeding founded upon the danger that the evidence might be lost before the time arrived at which the matters in question might be litigated. He cited *Vaughan v. Fitzgerald*, 1 Sch. & L. 316; Story's Eq. Pl. § 306; Dan. Pr. 321, 322, 1420.

Cassels, Q.C., for the plaintiff, contended that the Judicature Act and Rules permitted the joinder of any number of claims which the plaintiff might have against a defendant.

Hoyles, in reply. The Judicature Act does not interfere with the principles of law upon which actions to perpetuate testimony are allowed; Snell's Eq. 6th Ed. 595.

The MASTER IN CHAMBERS, 19th December, 1883, made the order striking out all matters and claim for relief not relating to the perpetuation of the testimony sought, on the ground that it was contrary to the principle of an action in which the perpetuation of testimony was asked to join therein any claim for relief.

[22ND DECEMBER, 1883.]

McLEAN v. SMITH.

Married Woman—Judgment—Setting aside—Acquiescence.

A judgment had been entered against a married woman personally, instead of against her separate estate, under the following circumstances: She said that she had handed the writ to her husband on being served with it, he had instructed a solicitor to enter an appearance for himself and his wife, and subsequently to confess judgment. Before judgment the husband and wife had disposed of land owned by her. Some personalty was sold under execution issued on the judgment. The wife now moved to set aside the judgment on the ground that it should not have been entered against her personally, but should have been a judgment against her personal estate.

The MASTER IN CHAMBERS refused to set aside the judgment, on the ground of lapse of time and acquiescence.

McClive, for the motion.

A. C. Galt, contra.

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THE CONSTITUTIONAL STATUS OF THE NORTH- WEST TERRITORIES OF CANADA.

HAVING in the first portion of this article attempted to give an account of the incorporation of the North-West Territories with the Dominion; and having discussed whether they are to be regarded as a colony by cession, or a colony by occupancy, and what laws were in force by reason thereof, it is now proposed to investigate the subject of the administration of justice in these Territories.

Previous to incorporation with Dominion.—Without professing to give a full account of the state of affairs previous to the incorporation of the Territories with the Dominion, it may not be thought out of place to mention such points in relation thereto as came incidentally under notice in the preparation of this article.

The Hudson's Bay Company claimed under their charter, and exercised for many years, jurisdiction in all matters, civil and criminal. The opinion of Sir R. Bethell and Sir H. S. Keating, before quoted (*a*), while recognizing the right of the Company to exercise such jurisdiction, continues, "nor could the Company insist on its right to administer justice as against the Crown's prerogative right to establish courts of civil and criminal justice within the Territory." The Crown had already, some fifty years pre-

(a) Ante p. 13: *Forsyth*, Const. Law (1869), 435.

viously, in 1803, exercised this prerogative right, and by Imperial Statute (b) the courts of Lower and Upper Canada had been given jurisdiction over all offences committed in the "Indian Territories or other parts of America not within the limits of the said Provinces * * * or any civil government of the United States."

By the Act 1 & 2 Geo. IV. cap. 66 the courts of these Provinces were declared to have both civil and criminal jurisdiction, and by way of greater certainty (as some doubts appear to have arisen as to whether the former Act extended to the Territory of the Hudson's Bay Company or not) the words were inserted, "any grant or charter to the Company notwithstanding" (c).

These courts had also power under this Act to issue commissions for the appointment of Justices of the Peace "to take evidence in any cause or suit, and to return the same or to try such issue, &c., &c." (d), and the Crown was empowered to create Courts of Record for the trial of petty offences, with a civil jurisdiction where the amount claimed did not exceed £200 (e). In the "Rupert's Land Act, 1868" (f) it was provided that, after incorporation with the Dominion, existing courts and officers should be retained in these territories until other provision should be made.

Present condition of Administration of Justice.—One naturally looks for information on this subject to the "North-West Territories Act, 1880" (g), consolidating and amending the several Acts relating to the North-West Territories, and which is expressly declared by the 45 Vict. cap. 28 not to be intended to be construed as new law. After providing for the appointment of a Lieutenant-Governor and Council (with such powers to make ordinances as the Governor-in-Council shall from time to time

(b) 43 Geo. III. cap. 138; see ante p. 14.

(c) See also *Conolly v. Woolrich*, 11 L. C. J. 197.

(d) 1 & 2 Geo. IV. cap. 66.

(e) *Ibid.*

(f) 31 & 32 Vict. cap. 105.

(g) 43 Vict. cap. 25.

confer, provided that such powers shall not at any time be in excess of those conferred on the Provincial Legislatures by the 92nd and 93rd sections of the British North America Act), and after dealing with various other matters, the Act, at section 71, takes up the subject of the administration of justice. It is not proposed to go through it section by section, but frequent reference will be made to it, as well as to Territorial legislation, as the different points present themselves in a general view of the subject.

Courts and Judiciary—Stipendiary Magistrates.—The principal judicial officers are known as Stipendiary Magistrates, whose powers may fairly be described as plenary. There are three of them in and for the North-West Territories, who must be barristers or advocates of at least five years' standing in any of the Provinces; they are appointed by the Governor-General by commission under the Great Seal. They hold office during pleasure, and reside in such district as the Governor-in-Council may direct (h).

General jurisdiction of Stipendiary Magistrates.—The jurisdiction of each Stipendiary Magistrate extends over the whole of the North-West Territories, though the magistrate "shall usually exercise such jurisdiction within certain districts to be defined by the Governor-in-Council" (i).

The object of this section becomes apparent at once when it is remembered that there are only three Stipendiary Magistrates to perform the judicial duties of the entire Territories, and one can thoroughly appreciate, after a few months' residence in the country and experience of the difficulties of communication and travel, how inconvenient it would be if the Stipendiary Magistrate were unauthorized to hold courts in any but the district under his own special jurisdiction. The Act gives him power "to hold courts, whether established by ordinance of the Lieutenant-

(h) 43 Vict. cap. 25, sec. 74. The Commissioner and Assistant Commissioner of the N. W. Mounted Police have all the powers and authority of Stipendiary Magistrates: 42 Vict. cap. 36.

(i) 43 Vict. cap. 25, sec. 75.

Governor or not, at such times and places as he may deem proper" (j).

Jurisdiction in Criminal Matters.—The Stipendiary Magistrate has practically unlimited jurisdiction. He has the powers of a Justice of the Peace, or of two Justices of the Peace, to try certain criminal charges in a summary way without a jury (k).

"In all other criminal cases the Stipendiary Magistrate and a Justice of the Peace, with the intervention of a jury of six may try any charge against any person or persons for any crime" (l).

In the case, however, of a death sentence, the Stipendiary Magistrate must defer the execution until the pleasure of the Governor-General shall have been ascertained and communicated.

Jurisdiction in Civil Cases.—The Stipendiary can hear and determine any case, with or without a jury according to the amount involved, and "shall give such judgments and make such orders and decrees as shall appear to him just and agreeable to equity and good conscience" (m).

The "Administration of Justice Ordinance, 1878" (n) passed by the Lieutenant-Governor in Council to regulate procedure and practice, has also some important clauses in regard to the jurisdiction of the Stipendiary Magistrates.

By section 4, the District Courts, established by the Ordinance, over which the Stipendiary Magistrates are to preside, "shall respectively have jurisdiction over all matters of civil law and equity, all matters of wills and intestacy, and (o) the disposition of the estates of infants and insane

(j) 43 Vict. cap. 25, sec. 85. Lt.-Col. Macleod, the Stipendiary Magistrate for the Bow River District, gave me the following vigorous example of the extent of his jurisdiction. He said, "If I am driving over the prairies in any part of the Territories, and a couple of men should happen to meet me with a dispute to be settled, I can then and there convert my buckboard into a Bench, hear the evidence and give judgment."

(k) *Ibid.* sec. 76.

(l) *Ibid.* sec. 76, s-s. 5.

(m) *Ibid.* sec. 85.

(n) N. W. T. Ord. 1878, No. 4.

(o) See N. W. T. Ord. 1879, No. 7, sec. 2.

persons, and shall possess such powers in relation to local jurisdiction as in the Province of Ontario are distributed among the several courts of law and equity, and the surrogate courts."

By subsequent sections, their jurisdiction in matters of probate, administration, guardianship, &c., is more clearly defined.

It might appear at first glance somewhat doubtful whether this Ordinance, so far at least as it may tend to alter the tenure of office and qualify the powers of the Stipendiary Magistrates to decide "according to equity and good conscience," was not *ultra vires*. Under the Dominion Act the Stipendiary Magistrates are given the fullest powers and jurisdiction. The Ordinance in question, however, provides for the establishment of certain District Courts of Record, to be presided over by the Stipendiary Magistrate resident in the judicial district, which courts are to possess the powers in relation to local jurisdiction etc., etc., (*vide supra*). Now if the doctrines promulgated by the learned Judges of the Supreme Court of British Columbia in the now celebrated Thrasher Case be sound, it might be argued that this Ordinance is an unauthorized interference with the jurisdiction and tenure of office of the Stipendiary Magistrates (*p*).

(*¶*) See the series of articles on Provincial Jurisdiction over Civil Procedure, 2 C. L. T.

The Supreme Court of Canada has given the following answers to the questions submitted to them as to the status of the Supreme Court of British Columbia: (1) The Court is of opinion that the Supreme Court of British Columbia is a Provincial Court within the meaning of sec. 92, s.-s. 14 of the British North America Act, 1867. (2) The Court is of opinion that the Legislature of the Province has exclusive legislative authority over the procedure in all civil matters in the Supreme Court of the Province which come within the legislative jurisdiction of the Provincial Legislature. (3) The Court is of opinion that the Legislature can make rules to govern the procedure of that Court, in all such matters as are limited by the preceding answer, and can delegate their power to the Lieutenant-Governor in Council. (4) The Court is of opinion that the "Judicial District Act, 1879" (B. C.) is within the powers of the Legislature of the Province, and that it does apply to the Judges appointed before that Act came in force. (5) The Court further held that, so far as they relate to procedure in the Supreme Court of British Columbia, the following Acts were constitutional: Better Administration of Justice Act, 1878 (42 Vict. cap. 20); 42 Vict. cap. 12, (1879); 44 Vict. cap. 1; Act to carry out the objects of the Better Administration of Justice Act; Judicial District Act, 1879.

By the "North-West Territories Act, 1880" the Lieutenant-Governor in Council has "such powers to make ordinances for the government of the North-West Territories as the Governor-in-Council may from time to time confer upon him. Provided always that such powers shall not at any time be in excess of those conferred by the 92nd and 93rd sections of the British North America Act, 1867, upon the Legislatures of the several Provinces. Provided also that no ordinance to be so made shall be inconsistent with, alter, or repeal" any Act of the Parliament of Canada in force in the Territories (q).

By Order-in-Council (r) the Lieutenant-Governor in Council has jurisdiction in matters relating to, "No. 6. Administration of Justice, including the constitution, organization, and maintenance of Territorial Courts of Civil Jurisdiction. No. 8. Property and Civil Rights in the Territories, subject to any legislation by the Parliament of Canada on these subjects."

Now even admitting the principle that the Lieutenant-Governor in Council, like the Provincial Legislatures, has "not any jurisdiction over the Judges themselves or their tenure of office, but rather over the Courts of which they are members" (s), and that "the Local Legislature had no power to diminish or repeal the powers, authorities, or jurisdiction of the Supreme Court, nor to allot any particular jurisdiction to any particular Judge, nor to alter or add to any existing tenures and conditions of the tenure of office of the Judges whether as to residence or otherwise" (t); and remembering also the truth, as well as the humour, of the dictum of Mr. Justice Gwynne, that "Courts for the administration of justice would be very imperfectly organized without judges" (u), it would appear upon investigation that the "Administration of Justice Ordinance, 1880" is not *ultra vires*.

(q) 43 Vict. cap. 25, sec. 9.

(r) Order-in-Council, 11th May, 1877, Stat. 40 Vict. p. lv.; and compare also British North America Act, 1867, sec. 92, s.-ss 13 & 14.

(s) 2 C. L. T. 573.

(t) Thrasher Case, cited *ibid.* p. 317.

(u) *Re Niagara Election Case*, 29 C. P. 280.

The Ordinance does not curtail the powers or jurisdiction of the Stipendiary Magistrates, nor alter, nor add to their tenure of office as to residence or otherwise. What it does is to provide a Court and machinery which the Stipendiary Magistrate can utilize *at such times and places as he sees fit*, a course which was evidently within the purview of the Dominion Act when it provided that he might hold Courts "*whether appointed by the Lieutenant-Governor or not.*" The Ordinance does not say he shall hold no other Courts; it says he shall preside in these Courts when and where he sees fit. It does not say he shall reside in any particular district, but that the Stipendiary Magistrate who does reside there "shall preside over the several Courts in such District."

Another question of some interest has been mooted under the 85th section of the Dominion Act by which the Stipendiary Magistrates are authorized to decide cases according to "equity and good conscience." The exact words are, "and the Stipendiary magistrate shall give such judgments, and make such orders and decrees, as shall appear to him just and agreeable to equity and good conscience" (v).

It is sometimes claimed that under these words the Magistrate has power to administer what may be termed "natural justice," and to decide cases *in foro conscientiæ*. Now as the whole of the early history of the Court of Chancery in England as depicted in the first chapter of almost every text book on equity jurisprudence may be cited to show how impossible it is for any Court to administer such justice, it does not seem worth while discussing the question very seriously. "There are many matters of natural justice which the Courts leave wholly unprovided for, from the difficulty of framing any general rules to meet them, and the doubtful policy of attempting to give a legal sanction to duties of imperfect obligation, such as charity, gratitude, and kindness" (w).

(v) 43 Vict. cap. 25, sec. 85, s-s. 2.

(w) Snell's Equity, p. 1.

It surely cannot be seriously argued that the judiciary in the North-West Territories are free from the trammels of the principles of the Common Law—free to ignore decided cases, and overlook such inconveniences as the Statute of Frauds, etc., when they find that they interfere with their own ideas of equity and good conscience—of “natural justice”—in relation to some particular case. *Misera est servitus ubi jus est vagum aut incertum*, however upright or impartial the judge may be.

Inferior Officers—Sheriff.—The Sheriff for the North-West Territories is appointed by the Lieutenant-Governor. His place of residence and of office is at Regina, but he has deputies in each of the judicial districts (x).

Justices of the Peace.—These functionaries are appointed by the Lieutenant-Governor, with jurisdiction extending throughout the Territories.

Coroners.—The Stipendiary Magistrates, Commissioner and Assistant-Commissioners of the North-West Mounted Police, and such other persons as may be appointed by the Governor-in-Council, are Coroners in and for the North-West Territories (y).

When an inquest is held the jury need not exceed six in number, but at least six jurymen must agree in the verdict (z).

Clerk of the Court.—Under the “Administration of Justice Ordinance, 1878,” the country is divided into several judicial districts. “The Stipendiary Magistrate, resident in the several judicial districts, shall have the power of appointing a clerk for each of the said districts” (a). The clerk in turn has power to appoint a deputy (b).

The duties of the clerk are to receive complaints and papers required to be filed; to issue writs, subpœnas, etc., tax costs, enter judgments, etc., etc.; keep proper books of

(x) 43 Vict. cap. 25, sec. 71.

(y) *Ibid.* sec. 82.

(x) *Ibid.* sec. 82, s-s. 4.

(a) N. W. T. Ord. 1878, No. 4, sec. 5.

(b) *Ibid.* sec. 9.

office; and to make an annual return to the Lieutenant-Governor of all proceedings in his office (c).

Constables, etc.—The Lieutenant-Governor has power to issue orders to the North-West Mounted Police in aid of the administration of civil and criminal justice (d).

Distribution of Judicial Business, etc.—Under the head of the Jurisdiction of Stipendiary Magistrates, it has been pointed out that, while they are each supposed to be resident in a particular place and to have under their especial judicial care a particular district, their jurisdiction extends over all the Territories.

By the "Administration of Justice Ordinance, 1878," the Territories are divided into three Judicial Districts :— (1) The Saskatchewan District; (2) The Bow River District; (3) The Qu'Appelle District.

Courts are held in each of these districts at least twice in each year. Each District Court has a seal, with which every process that issues from the Court is stamped. There is also for each division a clerk of the court, whose duties have been before pointed out.

It is not usual for sittings to be held at any regular periods. The Courts are held "at such times and places as the said Stipendiary Magistrate shall fix and appoint from time to time." There can, however, be little doubt that, as business increases, a change will have to be made, and regular sittings, at least at the more important places, established.

Suits are, as a general rule, to be entered in the Judicial District where the cause of action arose, or in which the defendant resides or carries on business; but they may be entered at the Court the place of sitting whereof is nearest the residence of the defendant, notwithstanding that the defendant may reside in a different district (e).

(c) N. W. T. Ord. 1878, No. 4, sec. 10.

(d) 45 Vict. cap. 25, sec. 72; *en passant* let it be said that the North-West Mounted Police perform very difficult and numerous duties with the greatest efficiency.

(e) N. W. T. Ord. 1878, No. 4, sec. 17.

When the Stipendiary Magistrate is unable to attend Court from any cause for six days in succession from the day appointed for the sittings, the Clerk shall notify the Lieutenant-Governor, who may request the Stipendiary Magistrate of another district to hold the Court at a time to be specially appointed (*f*). This, of course, is another example of a provision framed to suit the peculiar circumstances of the country.

Trial and Procedure in Criminal Cases.—The preliminary proceedings are usually very similar to those which take place in Ontario. The Act respecting procedure in Criminal Cases, etc. (*g*), is in force in the Territories, with the exception of certain sections (*h*), as well as the Acts relating to Justices of the Peace out of Sessions (*i*).

When the case is ripe for trial, it either comes before the Stipendiary Magistrate or two Justices of the Peace, in a summary way, or else before the Stipendiary Magistrate and a Justice of the Peace with the intervention of a jury of six. These Courts are open, public Courts, and the Stipendiary Magistrate takes notes of the evidence and other proceedings. The prisoner is admitted to defend by counsel, attorney or agent. When any person is convicted of a capital offence and sentenced to death, it is the duty of the Stipendiary Magistrate to forward full notes of the evidence, with his report of the case, to the Minister of Justice, and to defer execution until the pleasure of the Governor-General shall have been communicated to the Lieutenant-Governor (*j*).

Civil Cases.—A detailed account of the procedure and practice in civil cases would hardly prove interesting, but it may be well to give a general outline of the proceedings.

The Plaintiff files a statement of his claim in writing, and thereupon the Clerk issues a writ of summons with a copy of the statement of claim annexed, which is then

(*f*) N. W. T. Ord. 1878, No. 4, sec. 22.

(*g*) 32 & 33 Vict. cap. 29.

(*h*) See 43 Vict. cap. 25, sec. 96, and Schedule thereto.

(*i*) 32 & 33 Vict. caps. 30 & 31.

(*j*) 43 Vict. cap. 25, sec. 76.

served on the defendant. The writ calls upon him to appear before the Court on a specified day—this date being left to the discretion of the Clerk, who, however, generally consults the convenience of the Stipendiary Magistrate and of the defendant—and the case comes on for hearing without any further pleadings (*k*).

Ample provision is made for service out of the jurisdiction, for service on corporations, etc., and for proceeding in the absence of the defendant (*l*).

Witnesses who have been served with a subpoena *ad testificandum* and have been paid the proper fees, in case of non-attendance, are liable to be fined and in default to be imprisoned (*m*).

In cases of tort where the amount claimed does not exceed five hundred dollars, and of contract, where the amount claimed does not exceed one thousand dollars, the Stipendiary Magistrate can hear and determine the case in a summary way without a jury (*n*).

In all other cases, either party may demand a jury, to consist of six persons as provided for in the case of criminal trials (*o*).

Provision is made by the "Administration of Civil Justice Ordinance, 1878," for procedure against absconding debtors (*p*), garnishee proceedings (*q*), interpleader (*r*), replevin (*s*), testamentary proceedings (*t*), and guardianship of minors (*u*).

Forms of judgment and execution are given in the Ordinance, but these are of a simple nature, and new forms

(*k*) N. W. T. Ord. 1878, No. 4, secs. 11, 12, 19, 42, etc.; see also, Ord. 1879, No. 7.

(*l*) *Ibid.*

(*m*) N. W. T. Ord. 1878, No. 4, sec. 39; see also, 43 Vict. cap. 25, sec. 76, s-s. 13 & 14.

(*n*) 43 Vict. cap. 25, sec. 85, s-s. 1.

(*o*) *Ibid.* s-s. 2.

(*p*) N. W. T. Ord. 1878, No. 4, sec. 49.

(*q*) *Ibid.* sec. 57.

(*r*) *Ibid.* sec. 60.

(*s*) *Ibid.* sec. 63, *et seq.*

(*t*) *Ibid.* sec. 69.

(*u*) *Ibid.* sec. 72, *et seq.*

would have to be devised in complicated cases, where relief is granted requiring a judgment of the nature of a decree in Chancery; *e.g.*, foreclosure, dissolution of partnership, etc.

The right of appeal does not seem very satisfactory. "A person convicted of any offence punishable by death may appeal to the Court of Queen's Bench in Manitoba, which shall have jurisdiction to confirm the conviction or to order a new trial" (*v*), and in civil cases "Any person feeling himself aggrieved by the decision of any Stipendiary Magistrate, or presiding Judge, or court, in a claim, dispute, or demand under the second sub-section of the eighty-fifth section of this Act, may appeal to the Court of Queen's Bench in Manitoba, which shall have jurisdiction to confirm the decision or order a new trial" (*w*).

Thus it will be seen that, notwithstanding the extensive power and jurisdiction of the Stipendiary Magistrates, there is in reality no right of appeal given by the Act, but a mere right of applying for a new trial, and that only in certain cases; viz., in Criminal Cases where a party is convicted of a capital offence; in torts where the amount claimed exceeds \$500; and in contract where the amount claimed exceeds \$1000.

In conclusion, it is to be noticed that the "Administration of Civil Justice Ordinance, 1878," provides a practice and procedure for the District Courts, but does not, it is presumed, interfere with the Stipendiary Magistrate should he hold (as he would appear to have power to do) other Courts independent of these District Courts. A somewhat nice question suggests itself as to how far the Stipendiary Magistrate has jurisdiction himself to regulate practice and procedure. Has he not power to make any orders or direct any proceedings to be taken in the interests of justice, which he may deem advisable, at least where the "Administration of Civil Justice Ordinance, 1878," has neglected to provide a method of proceeding, *e.g.*, the issuing of commissions to take evidence, orders for the examination of

(*v*) N. W. T. Ord. 1878, No. 4, sec. 77.

(*w*) *Ibid.* sec. 88.

parties before trial, etc.? The writer regrets that he has not room in the present article to discuss this subject properly, but in favour of the view that the Stipendiary Magistrate has such powers, he would simply point out that, if the Ordinance in question had not been passed, the Stipendiary Magistrate must necessarily have fallen back upon his own powers and jurisdiction to regulate practice and procedure in his own Court, or there could have been no such thing in the North-West Territories as the administration of civil justice.

C. C. McCAUL.

EDITORIAL REVIEW.

The Proposed Bankruptcy Bill.

We have received a long letter from Mr. H. Symons upon this subject, in which he criticizes the provisions of the proposed measure described by Mr. Thomson in our December number. The letter has already appeared in the daily newspapers and we therefore think it unnecessary to reprint it.

Mr. Symons finds fault with the old Insolvency law for the facilities which it afforded for making voluntary assignments, the intermeddling of assignees, the powers given to creditors over insolvent estates, and the facilities for obtaining discharges.

With respect to the first, we cannot see why an insolvent debtor should not be at liberty to do voluntarily what the law will do for him by compulsion, if he does not do it, *i. e.* place his estate in liquidation. The evil was not in permitting debtors to make voluntary assignments, but rather in the method of dealing with the estates after the assignments were made. A debtor who was on reasonably good terms with his creditors, when contemplating an assignment, knew that he was not going before a Court of Justice, as long as he did not fall out with his creditors. As long as he could make a reasonably fair showing before his creditors, they would take what they could get and discharge him. Assignments were contemplated as one of the ordinary events in business which might happen at any time, and were no doubt taken into account in estimating results. If the debtor knew that in making an assignment he was submitting his affairs to the investigation of a Court of Justice, he would probably not be as ready to have

his estate wound up for him as where he merely puts himself in the hands of his business acquaintances and friends. This would be one of the many advantages of liquidating insolvent estates by means of a Court of Bankruptcy. The other evils mentioned by Mr. Symons arose out of the assignee system, and are answered by our suggestion of judicial liquidation, in which Mr. Symons agrees with us.

When, however, Mr. Symons enters into the details of the proposed judicial system, he treads upon shaky ground. His suggestion is to "add to the High Court of Justice in Ontario a 'Bankruptcy Division,' and create a similar Court in the other Provinces." In the first place, there is a want of symmetry in this. The Court of Bankruptcy, if there should be a distinct one, would be a Federal Court, and should not be composed of fragments of Provincial Courts. Its procedure should be uniform throughout Canada, if for no other reason than that members of the Bar of any Province would, we presume, be at liberty to practice before the Court in any other Province. But a stronger reason should prevail and that is that it would tend to produce uniformity of decision. In the second place, Mr. Symons has overlooked the fact that the Parliament of Canada has no power to add a Bankruptcy Division to the High Court of Justice of Ontario. It has power undoubtedly to erect a Bankruptcy Court and frame procedure: *Cushing v. Dupuy*, L. R. 5 App. Ca. 409; 1 Cart. 252; 2 C. L. T. 409, 457, 513, and cases there cited. It could, however, add to the jurisdiction of the Provincial Courts, or employ the Judges thereof for the purposes of a Court of Bankruptcy: *Niagara Election Case*, 29 C. P. 261; *Valin v. Langlois*, 8 S. C. R. 1.

The question of discharges is the most difficult to deal with satisfactorily. The fundamental principle should be that an honest debtor should, a dishonest debtor should not, get his discharge. Whether a debtor does or does not deserve his discharge, is therefore a matter to be determined upon the facts of each case, is matter for judicial investigation, and is therefore matter for judicial determination.

Appellate Business.

It seems to be the unlucky fate of Appellate courts to get behind with their work. In the Court of Appeal of Ontario there is a very respectable amount of work in arrear, but there are indications that it will be disposed of at no very distant day.

In the Province of Quebec the Court of Queen's Bench is getting largely into arrear, and the Executive, with the best intention no doubt of assisting the Court, appears rather to be hampering it. A debate is now going on as to the most advisable mode of arranging the sittings so as to enable the Court to perform the work at once expeditiously and efficiently. On the one hand regular terms are said to be the best; on the other hand, it is said that continuous sittings with intervals for deliberation are necessary. It appears to us that no one knows better than the Judges themselves how often the Court should sit, and how long its sittings should last. It should therefore be left entirely to the members of the Court (as it is left to the Judges of this Province) to arrange its sittings according to their good discretion. If all are not of the same mind, the majority should govern, as in other affairs where concerted action is necessary.

Haste in disposing of appellate business is quite as undesirable as delay.

Suitors and lawyers alike detest delay—and not without good reason. When judgment is prepared and delivered after the expiration of eighteen months or two years from the argument, no one can ever be induced to believe that as full justice can have been done to the arguments of counsel as if the judgments had been prepared and delivered a short time after the argument. This suspicion on the losing side is very often the leaven of another appeal.

On the other hand, undue haste has just as baneful an effect. The suspicion of too hasty deliberation is enough to tempt one to try another appeal.

We believe the system of assigning the preparation of judgments to different members of the Court does not exist

in this Province; and we hope it will never be introduced. A suitor is entitled to the independent opinion of every Judge before whom his case is argued. If a case goes to a Court of Appeal, and in that Court one Judge prepares the judgment, which on being read by the others is assented to as the judgment of the Court, it practically amounts to leaving the appeal to one Judge. If it is necessary that this should be done in order that the work before the Court may be disposed of, it is high time to stop hearing appeals until those which have been argued have been disposed of. If a case is to remain on the docket for many months or several years, it is better that it should remain unheard, than that it should be pigeon-holed after argument until the reasons urged by counsel for and against have been forgotten.

Administration of Justice in Manitoba.

A correspondent in Winnipeg sends us a newspaper which contains the following remarks on "Overworked Judges:—"

"To give an idea of how the Judges of this Province are worked—or rather overworked—we may state that the records of the prothonotary's office show the number of writs issued from January 1st, 1881, to January 1st, 1882, to be 735; the year following—ending January 1st, 1883—they increased to 2,874. During the present year there was a further bound upwards of writs issued to 5,800. In our Superior Courts, the fact is that we transact all the business that is done in Ontario by the Courts of Common Pleas, Queen's Bench and Chancery—Mr. Dalton's work as Referee in Chambers included—at a less cost than that of any one of the Ontario Courts mentioned. To overtake the duties devolving on them here, our Judges work day in and day out, without any let-up. It has to be mentioned, too, that nothing comes before our Courts except the suits really contested. All the non-contested matter is eliminated in Chambers upon applications to strike out appearances. Judge Ardagh, who has charge of the County Court in this district, disposes of some 3,000 cases a year in this city alone, in addition to holding something like fifty other

courts annually. Lest that might not be enough to tax the energies of any one man, he has to preside at Courts of Revision of voters' lists, and then take part with the other Judges in the interminable Chamber work to be done here."

Mr. Biggs is vindicated.

Dalhousie College Law School.

Haligonians are evidently firm believers in Law Schools. The Law School of Dalhousie College owes its origin to private munificence, its success to the energy of the Collegiate authorities. The names of some of the best lawyers of Nova Scotia appear amongst the members of the lecturing staff. So much for the School, and we hope that it may be the means of encouraging and developing a taste for the study of jurisprudence, which can never be acquired during the ordinary course of study which students at law and articled clerks are obliged to pursue in this country.

For the lecturers themselves, if we could devote space enough to their antecedents and their qualifications, we could not do better than reprint the sketches of a writer in the *Halifax Morning Herald*, which really contain some of the most amusing biographical portraiture that we have had the pleasure of seeing. Amongst many quaint notices, perhaps the quaintest is the manner in which the writer regards the productions of Mr. Russell, Reporter to the Supreme Court of Nova Scotia. "His share in the legal works of Russell and Chesley equals the whole of the writings of Walter Scott, is perhaps seven times the amount of Shakespeare's works, and may be half as large as Chambers' Encyclopædia. It will be seen that Mr. Russell has a literary history."

We wish success to the school and the lecturers.

Lefroy & Cassels' Notes of Practice Cases.

In our notice of this book we pointed out that *Western etc. Co. v. Dunn* was mentioned therein as unreported, whereas a report of the case appeared in the last volume of this journal, at page 359. Our attention has been again

directed to the title page of the book as indicating the fact that the book professes to note the decisions up to 1st July only. The report of the case, which was decided in June last, appeared in the July number of this journal, which did not appear till after the 1st July.

It was, however, a decision made before the 1st July, and the report was out several months before the book in question was ready. If the intention had been not to notice cases unreported on 1st July, it should have been left out of the book altogether. If, on the other hand, the intention was to notice all decisions given before the 1st of July, credit should have been given to the only report extant, though it appeared after 1st July. At present the book claims credit for the only report of an important point of practice. We do not for a moment suppose that there was any intention to ignore our report, but we think we were and are still justified in claiming credit for it.

The New Chancery Reporter.

Mr. Geo. A. Boomer has been appointed a Reporter to the High Court of Justice, Ontario, on account of the pressure of work in the Chancery Division. Mr. Boomer being a great favourite with the profession, his appointment of course is a pleasing one. There is something, too, in the very name which makes one believe that he will make good reports.

Judge Benson.

Judge Benson has been made the recipient of a very complimentary address from gentlemen of the Bar residing in Port Hope. The address was read by R. H. Holland, Esq., Police Magistrate of Port Hope, and Judge Benson replied.

NOTES OF RECENT DECISIONS.

In re Winstanley v. Carrick, 3 C. L. T. 596. The point to which our observations are directed in this case is the partial restraint upon alienation of an estate tail which was there held to be valid. Assuming the construction of the will to be correct, and E. R. to take an estate tail, it occurs to us that the restriction upon alienation of her estate should have been treated as void for its generality.

The restriction placed upon E. R.'s estate was, that she should not dispose of the same but by will. If an estate tail can be disposed of by will, this restraint would be partial only, and therefore good. If not, then the restraint would be total, and so repugnant to the nature of the estate, and void.

We venture to think it reasonably clear that an estate tail is not devisable. The course of descent of such an estate is directed by the deed of settlement itself—*per formam doni*—not by the tenant in tail, who taking under the deed cannot alter the deed, and therefore cannot alter the course of descent of the estate except by barring the entail in the method provided by statute.

If the estate were limited to a man and heirs female of his body, he could not alter its nature by devising the land to his heirs male. The estate must follow the limitations of the deed until the entail is barred. In *Campbell v. Sandys*, 1 Sch. & L. 294, Lord Redesdale said, "It has been contended that, if this had been a *quasi* estate tail, the will would have operated to bar the *quasi* estate tail and the limitation over. * * A will, so far as it is a disposition of property, is a designation of a special heir against the right of the person to whom the property would otherwise come by what may be called devolution of law, but that cannot, from the nature of the instrument, have the effect of depriving of a right, a person who does not claim by

devolution of law, but by virtue of a preceding gift or instrument. That must have been the ground on which it was established that the will of a joint-tenant cannot sever the jointure. It is an instrument by which the maker is enabled only to bar his heir at law or representative, but which cannot be allowed to alter the right of their parties." And Sugden, L. C., in *Allen v. Allen*, 2 Dru. & War. 326, said, "But the *quasi* tenant in-tail may defeat the settlement by alienation before issue born, provided it be by an act *intervivos*. I quite agree with the authorities which have decided that a mere will is not sufficient."

In fact, the deed of settlement has anticipated the will of the tenant in tail by designating the special heir, so to speak, who will take on the demise of the tenant in tail, if the latter have not barred the entail, and therefore the tenant in tail taking under that settlement cannot assume to designate another to take in the same event contrary to the form of the deed.

It is in recognition of the nature of estates tail that the Statute, R. S. O. cap. 100, sec. 29, in providing a means for barring entails, makes an express exception of wills as a mode of barring them. This section provides that a disposition of lands by a tenant in tail thereof "shall be effected by some one of the assurances (*not being a will*) by which such tenant in tail could have made the disposition if his estate were an estate at law in fee simple absolute."

An estate tail not being devisable, then, a restriction imposed upon the tenant whereby he can dispose of his estate by will only, is a total restriction, for there is assumed to be left to him only an impossible way of disposing of it. And the restriction would be repugnant to the nature of the estate and void; Dart. V. & P. 5th Ed. p. 18.

BOOK REVIEW.

A Manual of Psychological Medicine and Allied Nervous Diseases. Containing the description, etiology, diagnosis, pathology, and treatment of insanity, with especial reference to the clinical features of mental diseases, and the allied neuroses, and its medico-legal aspects, with a carefully prepared digest of the lunacy laws in the various States relating to the care, custody, and responsibility of the insane. By EDWARD C. MANN, M.D., member of the New York Medico-Legal Society, &c. Philadelphia: P. Blakiston, Son & Co., 1888.

This book, a substantial looking volume of nearly seven hundred pages, contains a good deal more Medicine than Law, and the greater part of it may therefore be left to the Doctors to attend to. There are several chapters in it however which are interesting to lawyers. They cannot however be regarded as authoritative. "Civil incapacity—legal test of responsibility," forms a title for a work by itself, and but few pages are devoted to it. This chapter may be regarded as sufficiently disclosing general principles to be of general use to medical men, but not of sufficient refinement for the profession of the Law. As a codifier, we recommend the author to the advocates of codes. The "Common Law as to Insanity" is codified in seven pages. Upon this chapter we have merely to repeat what we have said as to "civil incapacity." The author recommends that expert testimony should be given by a board of experts, which would in fact be a commission in lunacy. His idea is not new—in fact has been discussed so much that there is little more, if anything, to be said about it. Our own idea about the evidence in cases of insanity is that such evidence, whether containing the history of the supposed insane person, or a relation of

isolated acts of his every-day life should be admissible, and left to the jury for them to say whether or not the supposed insane person was or is able to control himself or to manage his affairs. The book has a very useful appendix, containing an abstract of the laws of the various States relating to the care and custody of insane persons.

RULES OF THE SUPREME COURT OF JUDICATURE, ONTARIO.

The following Rules of Court were passed at a meeting of the judges held on Monday, the 17th of December, 1888.

The taxing officers shall have power to allow increased counsel fees in Chambers to an amount not exceeding \$10. This order shall be substituted for item 166 in the order of 10th of September, 1881, respecting the tariff of charges.

It was further ordered that rule 459 of the Judicature Act be rescinded and the following substituted :—

Unless otherwise specially ordered in the particular case, service of pleadings, notices, summonses, orders, rules, and other proceedings shall be effected before the hour of four o'clock in the afternoon, except on Saturdays, when it shall be effected before the hour of two o'clock in the afternoon. Service effected after four o'clock in the afternoon on any week day except Saturday shall be deemed to have been effected on the following day: service effected after two o'clock on Saturday shall be deemed to have been effected on the following Monday.

This order shall take effect on and after the 2nd day of January, 1884.

REVIEW OF EXCHANGES.

Albany Law Journal.—24th November, 1883.

Assignment of Policy on Life of Assignor. The courts of New York, Vermont and Rhode Island held the affirmative, and those of Indiana, Pennsylvania, Kentucky, Massachusetts and Kansas, and the United States Supreme Court, hold the negative of the question whether one who has insured his own life may make a valid assignment of the policy to one who has no interest in his life as relative or creditor. On the affirmative side it is said that the policy is a mere chose in action and assignable as other choses in action are. On the negative it is said that to permit one to take out a policy on his own life and then assign it to one who had no interest in his life would be a mere evasion of the law against wager policies. The learned writer thinks the better reason is with the affirmative, though the weight of authority is with the negative.

Ibid.—1st December, 1883.

Common Words and Phrases. Apparatus, Appendages; Bucket-shop; Packet; Device; Raise; Good faith; Operation of railway; Tools; Box; are defined.

Ibid.—22nd December, 1883.

The presumptive validity of Judicial Acts, by JOHN D. LAWSON. Rule 1. Where a court having general jurisdiction acts in a case, its jurisdiction to so act will be presumed. Rule 2. But when the proceedings are taken by an inferior court, or are under a special authority granted to any tribunal in a special case, or for special purposes, or are not according to the course of the common law, the jurisdiction is not presumed, but must be shown. Rule 3. The regularity of the proceedings of courts of general powers is presumed, and so of the proceedings of inferior courts, jurisdiction being once shown to exist. Rule 4. Jurisdiction of the person beyond the territorial limits of a court of general powers cannot be presumed. Rule 5. A presumption cannot contradict facts averred or proved.

Ibid.—29th December, 1883.

Common Words and Phrases, Tippling purposes—beverage; Lost—misaid; Encroachment, obstruction; Conjuration; Ceased; Necessaries; Literary; Either; Business; are defined.

American Law Register.—November, 1883.

The remedies for the collection of judgments against debtors who are residents or property holders in another State, or within the British Dominions, by THOMAS M. COOLEY. In Maryland it has been held that a judgment in the alternative, as in replevin, for a return of property, and in default, payment of its value, will not support an action of debt in another State. A money judgment is *prima facie* evidence of a settled demand. Every State, for the purpose of enforcing private rights and redressing private wrongs, has jurisdiction, not only over its own citizens, but also over all others who may come within its territory; and also over all property within its own territory. While acquiring jurisdiction over such property for the purposes of its judgment, it can impose no personal obligation on the defendant for satisfaction of the judgment. The jurisdiction of the court rendering the judgment will be presumed, but the defendant may dispute it. But the irregular exercise of the jurisdiction, or an erroneous conclusion in a matter of law is no defence; for the court of one State will not act as a court of error to that of another. Whether fraud in obtaining the judgment is a defence has been mooted. There is authority in favour of the presumption that the court from which the process issued would have set it aside. But the validity of the defence is settled. In an action on a judgment against a corporation it must be shown, in addition to the ordinary proof, that the corporation existed by law within the jurisdiction where the judgment was rendered, that it expressly submitted itself to the jurisdiction, that by carrying on its business within the jurisdiction it impliedly assented to the local laws and to the provisions made thereby for the commencement of suits. Statutes giving to judgments against non-residents upon constructive notice the force of judgments *in personam* are inoperative. The remedies in an action on a foreign judgment are those peculiar to the domestic court.

Canada Law Journal.—1st November, 1883.

Redemption. *Martin v. Miles*, in which the Divisional Court of Chancery held that the right of a tenant to redeem a mortgage on the land which was the subject of his tenancy was not in the discretion of the court, but must be given effect to, is criticised. *Skaz v. Chapman*, 21 Gr. 534, and *Key v. Wilson*, 24 Gr. 212 are cited to show that redemption was refused to mortgagors on the ground of laches, though they were not barred by the statute of limitations. Other cases are cited.

Central Law Journal.—12th October, 1883.

Stipulation for Attorney's Fees in Promissory Notes, by ISAAC N. PAYNE. In some cases it has been held that such contracts are usurious, in others the Courts have refused to presume usury. Some States hold such notes void on grounds of public policy, as they tend to encourage litigation. After citing conflicting cases touching the negotiability of such notes, the learned writer proceeds, "The ground upon which all these cases hold that the negotiability of a note is not affected by an agreement to pay an attorney fee, is that the amount is fixed at

maturity, and a contract in the note, which does not take effect until after the note matures, cannot affect its negotiability. We cannot see why, on principle, such reasoning is not sound. The note is negotiable only until maturity, and if the agreement does not affect its terms while its negotiability lasts, why should it affect it at all?"

Assignments of Bills and Notes by Delivery—Liability of Transferrer when same are fictitious, forged or altered, by B. B. BOONZ. "The transferrer of commercial paper without endorsement, unless it is expressly stipulated otherwise between himself and his transferee, impliedly warrants that the paper is what it purports on its face to be—genuine, not fictitious, nor forged; and that since its execution it has not been altered in amount; and he is liable for a failure of consideration, if it should prove fictitious, forged, or altered. * * Where some of the signatures to the bill or note are genuine and others are forgeries, the rule remains the same as that above stated." In Kentucky the measure of damages in such a case has been held to be the amount paid for the bill, with interest and the costs and expenses incurred in the prosecution of the action to enforce its collection.

Ibid.—19th October, 1883.

Compositions with Creditors, by ELISHA GREENHOOD. "In the case of a creditor receiving fifty per centum of his claim in full discharge of the same, the Courts have asked, what has the creditor gained or the debtor lost by this proceeding? * * The debtor was bound to pay the debt the moment the creditor set the legal machinery at work for its collection. By this proceeding, then, the creditor incurs all the loss, and the debtor makes all the gain; which is just the reverse of the order of things which the law of contract declares must exist." The operation of this rule as laid down in *Pinnel's Case*, 5 Co. 117 a, may be escaped in the following cases:—(1) When the transaction takes place before the maturity of the debt. (2) When the payment of a part is made at a different place from that designated in the contract; the expenses of going to that different place being a sufficient consideration. (3) When the agreement is in writing under seal. (4) When the payment is made by a third person; or he becomes liable therefor. (5) When the debt is a partnership one, and one of the partners becomes liable for the composition. (6) When the debtor pays with his negotiable instrument. (7) When the debtor pays anything which he is not bound to pay in addition to the per centage. (8) When the debt is for principal and interest, and the debtor pays more than the principal, but less than the amount. (9) When the payment is made in anything but money. (10) When the subject matter of the composition is a note, bond, or any other obligation than a book account. (11) When the amount or existence of the debt is, in good faith, disputed. (12) When the debt is unliquidated. (13) When two or more creditors of a common debtor agree with each other and with the debtor to accept the per centage in full for their claims.

Ibid.—26th October, 1883.

Severance, to Ascertain a Chattel, not Absolute, by CHAS. A. BUCKNAM. English and American cases are cited. "The test to be

applied to cases to determine when separation is necessary to precede the change of title to a chattel from vendor to vendee is only that of identification. If the property, in cases like those cited, be of such a character and constituency that it can be clearly defined by its muniments, which are intended to operate as a transfer of it, the necessity of setting it apart is obviated by the mode of transfer. But while identity may be accomplished by description in the manner indicated, delivery cannot be effectuated to protect a purchaser against other persons who may be creditors or subsequent purchasers, unless there be a change of the relation of vendor and vendee."

Ibid.—2nd November, 1883.

Unincorporated Associations, by A. J. DONNER. The tendency is to regard such associations as partnerships. They must sue by one or more members on behalf of all. The weight of authority favours the validity of bequests and devises to such associations, irrespective of statute, if properly identified. The agreement made by the members determines the rights of the parties thereto. The membership may be of pecuniary value, as in the case of a stock exchange, but it is not available for creditors. The proceeds of the sale of a seat of an insolvent member has been held by the Supreme Court of the United States of America to be applicable to meet the claims of members to whom he was indebted, in preference to those of outside creditors. Some cases on club law conclude the article.

Ibid.—9th November, 1883.

Defective Covenants, by GEO. W. WARVELLE. Some cases are reviewed in which the effect of imperfectly filled blank forms of covenants in deeds is discussed. "And the said —, for —, heirs, etc., does covenant" has been held to be a nugatory clause. In a similar form where the word "their" precedes "heirs," but is not preceded itself by the word "themselves," it has been held to bind the heirs, but not the covenantor. "For them, — heirs, etc.," has been construed "themselves, their heirs, etc."

Ibid.—16th November, 1883.

The Consolidation of Corporations existing under the Laws of Different States, by CHARLES B. ELLIOTT. "The consolidation of corporations organized and existing under the laws of the same State creates an entirely new and distinct corporation. But this is not the result where the corporations owe their existence to different sovereignties. Although in fact they may be so united as to have a physical connection and be practically one body, yet they remain separate corporations in each State. * * A corporation created under the laws of Iowa, and afterwards consolidated with one in Missouri, remains in Iowa a corporation existing under the laws of that State alone."

Marriage Settlements, by EDMUND P. KENDRICK. Some English and American authorities are cited upon the effect of marriage settlements on dower and on the rights of creditors.

Ibid.—23rd November, 1883.

Merger in Enforcement of the Lien of Mortgage and Attachment, by W. W. THORNTON. A discussion upon whether the lien of the mortgage upon land is merged in the judgment of foreclosure.

Insanity as a Defence in Criminal Cases, by R. E. B. The learned writer is of opinion that where the defence shows that there is a reasonable doubt of sanity, that is sufficient to acquit.

Ibid.—30th November, 1883.

Ignorance of Law, by JOSEPH A. JOYCE. A review of English and American cases.

Directing Verdicts, by ADDISON G. MCKEAN. "In the highest Courts of the various States in our own country, the rule seems to be strongly upheld that where there is no evidence against the plaintiff or defendant, or where it is so deficient that the Court would be justified in setting the verdict aside, the Court may direct the jury how their verdict shall be."

Ibid.—7th December, 1883.

When is a Will Subscribed by Witnesses in the Testator's Presence ? by ELISHA GREENHOOD. A review of American cases.

Ibid.—14th December, 1883.

Married Women, by JAMES M. KERR. A review of American cases and statutes, and some English cases.

Liability of Telegraph Companies to Senders of Messages, by J. H. The English doctrine is stated that a telegraph company is under no obligations in respect to the transmission of messages other than such as arise out of its contract with the sender. The American Courts have held the companies liable to the receiver of a message for erroneous transmission, but not for negligent delay or non-delivery of a message.

Ibid.—21st December, 1883.

Conditional Subscriptions, by ADELBERT HAMILTON. A number of cases upon the subject are cited, in which the condition upon which a person subscribes for stock is generally given effect to.

Liability for Injuries to Employees, by JOHN F. KELLY. The discussion is confined to the case of a servant knowing of defects in machinery, and remaining in the service after a promise to repair the defect. The learned writer thinks the servant may rely on the promise to repair and that such repair will be made before the danger becomes obvious, and that he is not in fault in remaining.

Criminal Law Magazine.—July, 1883.

Once in Jeopardy, by M. A. THOMPSON. The learned writer propounds several questions, and gives his views of what the answers should

be. (1) When a particular trial comes to an end before a verdict is reached by the jury, as on account of the sickness or death of a judge, or of a jurymen, or the sickness of the prisoner, or the inability of the jury to agree, or the close of the term, and like cases—*quare*, has the defendant been in jeopardy? "Our view is that the defendant may be tried again under the circumstances stated in the question, without violating the constitutional principle, because he would be merely continuing in the same jeopardy." (2) When a defendant is tried on a bad indictment, does he incur jeopardy? The learned writer thinks that a prisoner is as much in jeopardy when so tried, as when tried upon a good indictment. (3) Where a defendant has been convicted, and he then obtains a new trial, is it logically or legally correct to apply the doctrine of waiver to his act of getting a new trial? Or, in other words, does he by that act waive his right not to be put twice in jeopardy? If the defendant has obtained a new trial and the prosecution enter a *nolle prosequi*, and indict the defendant anew, he may plead once in jeopardy. (4) May the same act constitute an offence against both the State and a municipal corporation, and may both punish the act without violating the constitutional provision? The weight of authority is in favour of the affirmative. "But to the writer it seems clear that, viewed in the light of what to him appears sound principle, a double punishment, such as that referred to above, would be a violation of a personal right solemnly guarded by the constitution." (5) Where an act is a crime by the laws both of the United States and of a State, may an offender against them both be twice tried and punished? Does the constitutional provision that no person shall be twice put in jeopardy for the same offence apply to cases of the kind mentioned? "The highest courts in this nation, and in a considerable number of the States, have answered affirmatively the first and negatively the second of these questions."

Ibid.—September, 1883.

Presumptions and the burden of proof, by JOHN D. LAWSON.

Rule 1. The law presumes the innocence of a person charged with crime until the contrary is proved beyond a reasonable doubt. Rule 2. A *prima facie* case does not take away from a defendant the presumption of innocence. Rule 3. Where there are conflicting presumptions, the presumption of innocence will prevail against (a) the presumption of the continuance of life, (b) the presumption of a continuance of a state of affairs once proved to exist, (c) the presumption of marriage, (d) the presumption of chastity. But it is otherwise as to (e) the presumption of knowledge of the law, and (f) the presumption of sanity. Rule 4. The presumption of innocence may be strengthened, as by the relation of the parties. (A. is indicted for the murder of B.: the fact that B. is A.'s wife strengthens the presumption of his innocence.) Rule 5. But, except for the purpose of the trial, a presumption of guilt arises from the finding of an indictment. Many illustrations of these rules are given.

Ibid.—November, 1883.

Void Sentences, by SEYMOUR D. THOMPSON. The subject is discussed under the following heads:—Judgments by *de facto* judges—pretended

judgments rendered by usurpers. Judgments rendered by courts in cases where they have no jurisdiction. Judgment rendered for the doing of things which are not, in point of law, offences. Sentences which courts are not authorized by law to impose for the crime of which the prisoner was convicted.

Presumptions and the burden of proof, by JOHN D. LAWSON.

Rule 6. Where a person does an act which is unlawful unless he possesses a certain qualification, the burden is on the prosecution to show that he does not possess the requisite qualification, unless the proof is peculiarly in his possession. Rule 7. A person is presumed to intend the necessary consequences of his acts. Rule 8. An act *per se* unlawful is presumed to have been criminally intended. Rule 9. Possession, knowledge or motive may overthrow the presumption of innocence, and raise in its place a presumption of guilt. Rule 10. A person on trial for one crime cannot be presumed guilty because he has, at another time, committed a similar or different crime, and the latter fact is not admissible in evidence against him. Rule 11. But to prove knowledge, intent, or motive, a collateral crime may be shown. Rule 12. A separate crime from that charged may be shown where it is necessary to prove that the crime charged was not accidental. Rule 13. A separate crime from that charged may be proved where it forms part of the *res gestae*.

THE
CANADIAN LAW TIMES.

OCCASIONAL NOTES.

ONTARIO.

Supreme Court of Judicature.

COURT OF APPEAL.

Q. B. D.]

[23RD JANUARY, 1884.

MONTEITH v. MERCHANTS' DESPATCH CO.

Carrier—Delivery at wrong place—Fall in market—Measure of damages.

The judgment of the Court below, 1 Ont. R. 47; 2 C. L. T. 214, was affirmed.

Osler, Q.C., and W. Nicholas Miller, for the appellants.

MacGregor, for the respondent.

BLAKE, V.C.]

[23RD JANUARY, 1884.

In re MURRAY; PURDOM v. MURRAY.

Administration—Gift inter vivos—Note payable to order unendorsed—Declaration of trust.

The widow of a testator claimed as a gift from her deceased husband a promissory note payable to the order of the testator and not endorsed by him. It appeared that she had had possession of this note and others

belonging to the estate during her husband's lifetime. The Master at London found, upon the evidence, that the testator had intended the note to belong to his wife, and held that there had been a gift *inter vivos* of the same to her. On appeal, Blake, V.C., reversed the Master's decision.

Held, reversing the decision of Blake, V.C., 29 Gr. 443, that the note belonged to the widow and did not form part of the assets of the testator's estate.

Per Spragge, C.J.O. There was a valid gift *inter vivos* of the note.

Per Burton and Patterson, J.J.A. The testator, on the evidence, had constituted himself a trustee for his wife of the note.

Moss, Q.C., for the appellant.

W. Cassels, for the respondent.

High Court of Justice.

QUEEN'S BENCH DIVISION.

[HAGARTY, C.J., 22ND JANUARY, 1884.]

REGINA v. HOWARD.

Municipal by-law—Fire limits—Repairing wooden buildings—Ultra Vires.

The corporation of the City of Hamilton passed a by-law, in pursuance of R. S. O. cap. 174, sec. 467, s-s. 6, which defined fire limits, within which buildings were to be of incombustible material, the roofs to be of certain metals, or slate, or shingles laid in mortar not less than half an inch thick, and no roof of any building already erected within the fire limits was to be re-laid or re-covered, except with one of the enumerated materials. The defendant was convicted of a breach of this by-law for having laid new shingles on his wooden house within the fire limits without laying them in mortar, being the mode of construction of the roof before the repair. The house had been standing for many years before the by-law was passed.

Held, that the by-law was *ultra vires* in so far as it was retrospective, the statute intending to permit buildings erected before the passing of the by-law to be repaired in like manner as they were originally constructed, but prohibiting the erection of, or addition to, buildings, or the removal or placing of a wooden building in a new locality within the fire limits.

W. H. P. Clement, for the defendant.

MacKelcan, Q.C., contra.

[WILSON, C.J., JANUARY, 1884.]

In re MACKENZIE AND THE CITY OF BRANTFORD.*Municipal Council—Public Health Act—Powers thereunder—By-law, validity of—Delegation of powers.*

The members of the Council of any Municipality are health officers of the Municipality by virtue of the Public Health Act, R. S. O. cap. 190, and as such they may enforce the provisions of secs. 3 to 7 of that Act without by-law; but if they delegate their powers to a committee they must do so by municipal by-law. They cannot, however, delegate any powers except those which they exercise under the Public Health Act.

A by-law passed by the Municipal Council of the City of Brantford regulating the cleansing of privy vaults and imposing a fine of not less than \$1, nor more than \$50, for a breach of its provisions,

Held, valid.

Held, also, a municipal by-law, and not one passed under the Public Health Act, and therefore that it was not bad in making the penalty for breach more than \$20 as permitted by the Public Health Act.

H. T. Beck, for the motion.

Wilkes, contra.

[11TH JANUARY, 1884.]

NEALD v. CORKINDALE: FOSTER, *Third Party*.*County Court action—Third party—Trial of issues between defendant and third party—Investigating accounts beyond pecuniary jurisdiction of County Court—Prohibition.*

An action in a County Court on a promissory note made by the defendant, in which the defendant claimed indemnity against the third party. The third party having appeared, the learned Judge of the County Court directed certain issues to be tried between the defendant and the third party. At the trial he found for the plaintiff, and investigated accounts between the defendant and the third party amounting to more than \$10,000, upon which he found that a balance of more than \$3,000 would be payable to the defendant; and he directed that the third party should, out of this balance, pay to the defendant the amount of the plaintiff's claim. On a motion for a prohibition,

Held, that the order directing the issues between the defendant and the third party, and the proceedings taken under it, were right.

Held, also, that as the only relief which could be given to the defendant against the third party was protection against the demand of the plaintiff, which was within the pecuniary jurisdiction of the County Court, the learned Judge was not acting beyond his jurisdiction in investigating accounts of sums beyond his jurisdiction.

J. H. Macdonald, for the motion.

McMichael, Q.C., and *Ogden*, contra.

COMMON PLEAS DIVISION.

[OSLER, J.]

PHOENIX INS. CO. v. ANCHOR INS. CO.

*Marine Insurance—Contract in accordance with rules—Seaworthiness—
Total loss—General average—Particular average—Costs.*

On 1st September, the plaintiffs insured the "Mary Merritt" for \$6,000, for 15 days, by acceptance of an application for insurance called a "binding application," made to them by M., the owner. On the same day, on application of the plaintiffs, a memorandum was written in the margin of the application, signed by the manager and secretary of the defendants' company, that they covered one-fourth subject to survey and approval at first port of arrival, etc. On the 4th April, an agreement was signed by defendants' president and manager, under which defendants were to cover a fourth part of the risks accepted by plaintiffs, but it was expressly agreed that the risks covered were only on hulls of vessels not classed below B 1.

By the defendants' Act of Incorporation, 36 Vict. cap. 103, all policies, instruments, etc., issued or entered into by defendants were to be signed by the president or vice-president, and countersigned by the manager and secretary, or as otherwise directed by the rules and regulations of the company in case of their absence, and so signed, etc., should be deemed valid, etc.

Held, that the agreement of 4th April could not be relied on, as it was limited to vessels not below B 1, and the evidence showed that the "Mary Merritt" had never been classed; but that the contract was contained in the memorandum written on the margin of the application, and that it was so signed as to be binding on the defendants; for that, in the absence of evidence to the contrary, it must be deemed to be signed in accordance with the rules and regulations of the company.

It appeared that the vessel was driven ashore on the 6th September, whereupon the plaintiffs, of their own motion, procured a tug, steam pumps, etc., got the vessel off, and towed her to Detroit, where she was put into a dry dock and repaired. The salvage charges and repairs, etc., amounted to \$4,000. On 26th September the owner notified the plaintiffs that he abandoned the vessel, and would not be responsible for any of the expenses, etc., whereupon the plaintiffs settled with him for some \$3,000. On 29th September the vessel was libelled for seamen's wages and salvage charges, and was subsequently sold to pay same. The actual damage done to the vessel only amounted to \$190. At the time of the accident the vessel had only one anchor, having lost, a short time previously, a second one which she had.

Held, that there was no express warranty as to seaworthiness, and being a time policy none could be implied; and that there was no evidence to show that the having only one anchor constituted unseaworthiness.

Held, also, (i) there was no total loss, so far as defendants were concerned; (ii) defendants were liable as upon a general average for expenses

incurred by plaintiffs as salvors and insurers, in saving the ship, after deducting the proportion to be borne by the owners of the vessel and cargo; (iii) the cargo was in fact salvaged by the plaintiffs and delivered to the owners; (iv) there was no particular average for which the defendants were responsible, or towards which defendants were liable to contribute. The pleadings were directed to be amended according to the findings, and the costs apportioned.

McMichael, Q.C., and *W. T. Boyd*, for the plaintiffs.
Osler, Q.C., for the defendants.

[ROSE, J., 21ST DECEMBER, 1883.]

COOPER v. CENTRAL ONTARIO RAILWAY CO.

Verdict subject to reference—Failure of reference by lapse of time—Setting aside verdict in single court—Changing place of trial.

At the Ottawa Assizes a formal verdict was entered for the plaintiff, subject to a reference. The reference failed through the omission of the arbitrator to enlarge the time for making the award.

A judge sitting alone in Court set aside the verdict and ordered a new trial.

The plaintiffs resided at Montreal, and the defendants' officers at Ottawa, and some of the plaintiffs' witnesses resided at Toronto; and it appeared that Toronto was as easily accessible as Ottawa, and that unless a change of the place of trial was directed, the case would not be tried until the Spring Assizes.

Under these circumstances the place of trial was changed to Toronto, and the case directed to be tried at the January sittings.

Arnoldi, for the plaintiffs.
Marsh, for the defendants.

CHANCERY DIVISION.

[BOYD, C., 14TH JANUARY, 1884.]

OMNIUM SECURITIES CO. v. RICHARDSON.

Specific performance—Contract by correspondence—Offer without prejudice—Evidence to explain letters.

The defendant wrote a letter to W., who was the plaintiffs' manager, saying, "I have considered the matter of your conversation * * and have come to the conclusion to offer you \$800 for the property, and then I doubt if I am doing justice to myself, because I have no use for it, and as long as I do not get a customer, the interest and taxes would soon eat up any apparent profit I may see in it." The offer was made without prejudice. W. acknowledged the receipt of the letter and, after describing

the property particularly, proceeded, " Although the price is much less than the amount due us on foot of our own mortgage, but with the hope that you may soon be able to restore your son (now absent) in his former position, I have concluded to accept your offer (viz: \$800). Please give us the name of your solicitors, and we shall prepare the deed at once and forward it to them." The defendant subsequently refused to purchase. It appeared in evidence from the conversation referred to in the defendant's letter that he desired to purchase at five or seven years credit.

Held, that there was no contract, for the parties differed in their understanding of it, the defendant's offer being to buy on time and his letter being explicable only on that theory, while the plaintiffs' acceptance was as of a cash offer.

Held, also, that though the defendant's offer, being without prejudice, was privileged before and in default of acceptance, after acceptance the privilege was removed.

Held, also, that it sufficiently appeared on the face of W.'s letter that he was the plaintiffs' manager; and that evidence was admissible to connect the mortgage mentioned in the letter with the correspondence, from which mortgage it appeared that the plaintiffs were mortgagees with power of sale.

McClung v. McCracken, 2 O. R. 613; 3 C. L. T. distinguished.

W. Nesbitt, for the plaintiffs.

Ross, for the defendant.

[19TH JANUARY, 1884.]

CARNEGIE v. FEDERAL BANK.

Pledge of stock—Agreement for margin—Default—Sale of stock—Account.

The plaintiff obtained an advance from the defendant, to secure which he transferred to them 369 shares of stock, upon the agreement that he would keep up a cash margin of not less than ten per cent. above the value of the stock as quoted in the newspapers, and in the event of default the defendants were authorized " to sell and dispose of the said security without notice, and to apply proceeds in liquidation of said advance." Default occurred, and thereafter on 22nd June, 1878, the defendants disposed of some of the shares, and subsequently they transferred the shares by way of loan and got them back from time to time, but did not sell them. They continued to charge interest to and deal with the plaintiff as if the shares were his.

Held, that the defendants had not power to deal with the stock, except on default, and then only for the specific purpose of selling the same, to apply the proceeds in liquidation of the debt; that each transfer of stock by way of loan was in fact a sale thereof, and that the plaintiff, if in default at such time, was entitled to have the proceeds at the current rate on that day applied on the debt; but if not in default, to elect whether he would claim damages, or affirm the sale and claim the profits thereby made.

Held, also, that the onus lay upon the defendants to show that the stock which they dealt with was the same stock which they afterwards got back and held under the plaintiff's pledge.

BEATTY v. N. W. TRANSPORTATION CO.

Sale by director to Company—Ratification by shareholders—Majority vote on shares of vendor—Validity of sale.

One of the directors of the defendant company sold to the company a vessel, and at a general meeting of the shareholders the sale was approved by a majority of votes, the majority being obtained by votes upon the shares held by the vendor.

Held, that there was no valid ratification of the transaction and that the minority were not bound by a majority vote obtained by means of the votes upon the shares of the vendor, whose interest it was to have the sale carried out.

Bethune, Q.C., for the plaintiff.

Robinson, Q.C., and *J. H. Macdonald*, for the defendants.

THE BANK OF TORONTO v. THE COBOURG P. & M. RAILWAY CO.

Debentures—Nature of—Sealing in blank—Insertion of obligee's name.

Debentures partake rather of the nature of promissory notes than of mortgages and should be subjected to the rules of the law merchant applicable to negotiable instruments, rather than to the rules of the common law relating to deeds.

Held, therefore, that debentures issued by the defendants pursuant to 38 Vict. cap. 47 (O), should be so treated, though sealed, and forming a charge on the real and personal property of the company, with powers of foreclosure to the holders.

The debentures were sealed in blank and delivered to the managing director of the defendants, who was also treasurer and secretary, and who countersigned the debentures as treasurer, to be dealt with by him at his discretion. When the occasion required it, he filled in the plaintiffs' name as obligees, and negotiated them with the plaintiffs.

Held, that the managing director was empowered to complete the debentures by so inserting the names of the obligees and that they were not invalidated thereby.

[PROUDFOOT J., 9TH JANUARY, 1884.]

CANADA ATLANTIC RAILWAY CO. v. CITY OF OTTAWA.

Municipal by-law—Aid to Railways—Validity of by-law—Naming day to take effect—Date of maturity of debentures.

A by-law of the defendants granting aid to the plaintiffs by the issue of debentures was read a first time on the 22nd of September, 1873, was first advertised on the 24th September, voted on by the electors on 16th October and read a second and third time and passed on 20th October following.

This being contrary to 36 Vict. cap. 48, sec. 231, s.-s. 3 (O), which enacts that it can only be taken into consideration by the Council after one month from the first publication, a motion was made on 5th November following to read the by-law a second and third time, and was lost. At a meeting of the Council on 7th April, 1874, the by-law was read a second and third time and passed. The by-law as voted on by the rate-payers named the 13th December, 1873, as the day on which it should come into force. The by-law as passed by the Council named the 30th of December. The debentures were made payable on 29th December, 1893. In an action by the Railway Company to enforce the delivery of the bonds,

Held, that the by-law was invalid, for (i) it named a day not in the financial year in which it was passed upon which it was to take effect, contrary to 36 Vict. cap. 48, sec. 248, s.-s. 1; (ii) the debentures were to be made payable more than twenty years after the day the by-law as submitted to the rate-payers was to take effect, contrary to the same Act, s.-s. 2; (iii) the by-law being invalid as voted on could not be made effectual by the Council.

The defendants' Council in 1879 tried to induce the municipalities of Russel and Cambridge to grant bonuses to the plaintiffs; in 1881 the Council passed a resolution asking the Railway Company to commence and proceed with the construction of their road in the interest of the working classes; another resolution was passed in 1881 requesting the mayor and finance committee to take immediate action on the by-law and if there were no legal objections to hand over the debentures, but the committee were advised by the solicitor not to do so.

Held, that the by-law was not thereby rendered valid, nor any liability on the part of the defendant admitted.

COOK v. NOBLE.

Will, construction of—Executory limitation over—Legacy for particular purpose.

A testator, by his will, made 8th January, 1882, directed his trustees to divide his real estate equally amongst his sons, then living, when his eldest son should attain 25, when the share coming to his eldest son was to be conveyed to him by the trustees. In case any of his sons should die before 25 and without issue, then the share of the party so dying should be divided equally amongst his sons then living. The eldest son died under 25, leaving a widow and an infant daughter, having made a will which did not affect his realty.

Held, that the devise to the eldest son was a devise in fee simple subject to an executory limitation over, which limitation was not to take effect except on the happening of both contingencies, viz., the dying without issue, and before 25; and therefore that his infant child was entitled to the land subject to her mother's dower.

The testator bequeathed \$2,000 to his eldest son, to stock the farm which he left him.

Held, that the legacy was absolute.

PETERBOROUGH REAL ESTATE INVESTMENT CO. v. IRETON.

Judgment—Res inter alios adjudicata.

Action by mortgagees against the assignee of the equity of redemption, claiming, in addition to the mortgage debt, damages suffered by them in consequence of distraining for arrears of interest at the request of the defendant, when one F. was in possession. The judgment for the plaintiffs referred it to the master at Peterborough to take the usual mortgage accounts, and also to inquire what damages the plaintiffs had properly suffered or been put to by reason of their having made the distress, and to add the damages to their claim under the mortgage. It appeared that F. brought an action against the plaintiffs for the distress, and before the trial the defendant, who was not a party to the action, wrote to the defendant's solicitor, therein offering to bring witnesses whose evidence would defeat the action. No reply was made to this letter. F. recovered judgment. On the reference in this action, the master held the judgment of F. for damages against the plaintiffs conclusive evidence as to the amount of damages claimed by the plaintiffs, which they were entitled to recover against the defendants.

Held, reversing the decision of the master that the defendant was not bound by the judgment, but was entitled to give evidence to show that the plaintiffs had not properly suffered the damages claimed by them.

[17TH JANUARY, 1884.]

MOOREHOUSE v. BOSTWICK.

Partnership—Dissolution—Assignment of assets to continuing partner—Joint and separate creditors—Priority.

L. A. M. and W. J. M. were in partnership carrying on business under the name of M. Bros. On 16th February, 1883, the partnership was dissolved, and W. J. M. assigned all his share to L. A. M., the latter covenanting with him to pay off the creditors of the firm. L. A. M. became insolvent, and on the 18th April, 1883, made an assignment to the defendant in trust for creditors. The assets in the defendant's hands were composed partly of partnership assets, partly of assets of the business carried on by L. A. M. after the dissolution, and partly of L. A. M.'s separate estate. L. A. M. never made himself separately or exclusively liable to the partnership creditors.

Held, that by the assignment of W. J. M. to L. A. M., on dissolution, the joint estate was converted into the separate estate of L. A. M., and that therefore the separate creditors of L. A. M. were entitled to priority over the partnership creditors in the distribution of the assets in the defendant's hands.

Moss, Q.C., for the plaintiff.

J. H. Macdonald, for the defendant.

[FERGUSON, J., 12TH JANUARY, 1884.]

WALLACE v. TOWN OF ORANGEVILLE.

Estoppel.

The Government of Canada having placed in the estimates a sum for the purpose of building a post office in the Town of Orangeville, upon the condition that the town should furnish a site therefor, and a dispute having arisen amongst the inhabitants as to which of two sites should be chosen, defendants' council passed a resolution leaving the choice of a site to a vote, but containing no reference to payment therefor. The plaintiff took an active part in the election which followed, opposing the choice of a piece of land belonging to one M., which was finally chosen as the result of the vote.

Held, on a motion for an interim injunction to restrain the defendants from paying over to M. the price of the land so chosen, that the plaintiff was not estopped from asking this relief by the part which he had taken in the election, for the resolution submitting the question to the vote did not submit the question of payment for the site.

E. Myers, for the plaintiff.

McCarthy, Q.C., and *Walsh*, for the defendants.

IN CHAMBERS.

[BOYD, C., 14TH JANUARY, 1884.]

BLAKE v. BUILDING AND LOAN ASSOCIATION.

Appeal from Master's report—Time, computation of—Christmas vacation.

The term "vacation," used in G. O. 642, includes the Christmas, as well as the long, vacation. Hence the Christmas vacation is not to be counted in the time within which an appeal from a Master's report may be made.

Notice of appeal from a report, dated 29th November, 1883, was given on 31st December, 1883, for 7th January, 1884.

Held, good.

Cassels, Q.C., and *Rolph*, for the appeal.

Hamilton, contra.

MANSON v. MANSON.

Judicial sale—Standing conditions—Land subject to lease—Right of purchaser to possession—Compensation.

At a judicial sale of a farm, the conditions were the standing conditions of the Court, providing for the delivery of possession to the purchaser upon payment of the balance of the purchase money within one month after the sale. The purchaser lived upon a part of the lot which was not

sold, and was aware that the farm sold was occupied by a tenant, but swore that he did not know the terms of the tenancy, that he relied upon the conditions of sale, and that he bid more for the land because there were growing crops thereon than he would otherwise have done. The purchaser paid the balance of his purchase money into Court at the proper time, but did not get possession then, nor had he got possession at the time of this application. He now moved for an order for delivery of possession and for compensation for not getting the growing crops and for being kept out of possession and for a vesting order.

Held, that the vendors were bound by the terms of the printed and published conditions of sale and that it was not the business of the purchaser to acquaint himself with the terms of the tenancy, and by enquiry to ascertain whose were the crops.

G. H. Watson, for the purchaser.

W. Mortimer Clark, for the plaintiffs.

Harcourt, for the infant defendants.

In re LYONS.

Taxation of costs—Higher scale—Mortgage sale—Payment into Court of surplus under \$200—Validity of second mortgage.

A sale by a mortgagee, under the power in his mortgage, produced a surplus of \$162, which he paid into Court. A third mortgagee petitioned for payment out to him, alleging that the second mortgage was void. A reference was directed to the Master, who found that the second mortgage was valid and that more than \$1,100 was due upon it. An order was made, upon further directions, for payment out to the second mortgagee, with costs of the petition and reference. The claimants on the fund lived in different counties. The taxing officer allowed costs on the higher scale. The petitioner appealed.

Held, affirming the ruling of the taxing officer, that the contest was in respect of the second mortgage and its validity, and not merely in respect of the sum of \$162, and the subject matter therefore was beyond the limits of the former equitable jurisdiction of the County Court and the costs were properly taxed.

Held, also, affirming the ruling of the taxing officer, that the costs were properly taxed on the ground that the claimants lived in different counties and the fund in question was in Court in a third county, which would have ousted the equitable jurisdiction of the County Court.

A. C. Galt, for the appeal.

Cassels, Q.C., contra.

[THE MASTER IN CHAMBERS, 4TH JANUARY, 1884.
FUCHS v. TRIBUNE PRINTING CO.

Winding up Company—Presentation of Petition—Stay of Proceedings.

The plaintiff on 31st December served a petition to wind up the defendant company under 45 Vict. cap. 23 (D). The petition had been filed and would be brought on for hearing on 5th January.

On this day *Holman*, for the plaintiff, applied *ex parte*, under section 18 of the Act, to restrain the judgment creditors of the defendant company from proceeding to sell the goods and chattels of the company which had been seized under execution.

THE MASTER IN CHAMBERS held that the filing and serving of the petition was the presentation thereof within the meaning of section 18 of the Act, and made this order asked for. H. C.

[9TH JANUARY, 1884.]

DUFFY v. DUFFY.

Judgment by default—Regularity—Standard time.

Judgment for want of a defence was signed by the plaintiff on 29th December, 1883, though it might have been regularly signed at any time during the previous day. The defendant moved to set aside the judgment on the ground that the defendant's solicitor had presented himself at the proper office with a statement of defence ready for filing at the hour of ten o'clock in the morning of the 29th December, according to meridian time, but that judgment had been signed on that morning before that hour, though it was after ten o'clock according to the new or standard time.

The MASTER IN CHAMBERS refused to set aside the judgment on this ground, holding that it had been properly signed; but even if there were any question as to the time at which it might have been signed, inasmuch as the plaintiff might have signed judgment at any time during the previous day the judgment must be considered regular.

The defendant was let in to defend on the merits.

Geo. M. Evans, for the motion.

Holman, contra.

H. C.

COTTON v. MITCHELL.

Insolvent Act of 1875—Insolvent plaintiff—Composition and discharge in Quebec—Confirmation of in Ontario—Security for costs.

The plaintiff having become insolvent under the Insolvent Act of 1875, was ordered to give security for costs. He now applied to have the order vacated on the ground that he had obtained a discharge in insolvency. It appeared that a writ of attachment had issued in the city of Montreal, under which John Whyte became assignee, and another writ issued in the city of Ottawa, under which Frank Clemow became assignee. The defendant obtained a composition and discharge from the various creditors who had proved with John Whyte as assignee in Montreal, which was confirmed by the Judge of the County Court of the County of Carleton, in the Province of Ontario.

The MASTER IN CHAMBERS held that the Judge of the County Court of the County of Carleton had no jurisdiction to confirm a composition and

discharge founded upon insolvency proceedings taken in the Province of Quebec, and refused the motion with costs.

Lawless (*John O'Donohue*), for the motion.

Holman, contra.

H. C.

[12TH JANUARY, 1884.]

CLARK v. ST. CATHARINES.

Security for costs—Insolvent plaintiff suing for benefit of others.

In an action brought by a ratepayer, for himself and the other ratepayers of St. Catharines, to restrain the delivery by the corporation of certain debentures to a railway company, it appeared from the examination of the plaintiff that he was financially incompetent to pay the defendants' costs, that he was only interested to an insignificant extent himself and that he expected certain persons named to pay his costs, and to protect him, should the case go adversely to him, that he did not want to spend any money on the prosecution of his own right in the matter and that he did not know who instructed the plaintiff's solicitors.

The MASTER IN CHAMBERS held that the defendants were entitled to security for costs.

Plamb. for the motion.

Hoyle, contra.

[14TH JANUARY, 1884.]

DOERR v. RAND.

Security for costs—Præcipe order—Setting aside—Stay of proceedings.

A defendant is not necessarily entitled to security for costs because the plaintiff resides out of the jurisdiction.

If it be made apparent by evidence which the Court should look at that the defendant has no defence, security will not be ordered.

The defendant admitted, on his examination in the cause that he owed the debt sued for, but he afterwards set up a counter-claim for illegal arrest by the plaintiff in the course of this action.

Held, that under these circumstances the defendant was not entitled to security for costs, and a præcipe order for security was set aside with costs.

Held, that a præcipe order for security for costs is a stay of proceedings while it exists; and therefore a motion for judgment, made simultaneously with the motion to set aside the præcipe order for security for costs, was refused.

FITZSIMMONS v. WILSON.

Judgment under Rule 80—Special endorsement—Sufficiency of—Amendment.

Giddes moved for judgment under Rule 80 on a writ endorsed as follows:—"The plaintiff's claim is for \$420.37, balance of work, etc., less

credits and as agreed upon. The plaintiff claims interest on \$420.37 until judgment."

Holman contended that the endorsement was not sufficient.

The MASTER IN CHAMBERS allowed the objection and refused the order; but he allowed the plaintiff to amend, with liberty to renew the motion after a lapse of ten days from the service of the amended endorsement.

H. C.

PRINCE EDWARD ISLAND.

In the Supreme Court,

[30TH NOVEMBER, 1883.]

STEWART v. TROWSDALE.

Insolvent Debtors Act—Allowance—Preferential Lien.

The defendant was brought up for examination under the Insolvent Debtors Act. After service of the writ in this action, he had made a bill of sale to another creditor.

Held, that notwithstanding this the defendant was entitled to his allowance, for there is nothing to prevent a debtor from giving one creditor a preferential lien after proceedings commenced against him by another creditor, provided that the transaction is *bona fide*, and not done with fraudulent intent.

N. McLeod, for the plaintiff.

Peters, for the defendant.

County Court, Queen's County.

[ALLEY, Co. J., 26TH DECEMBER, 1883.]

TRAINOR v. HUGHES.

Constitutional law—Common assault—Conviction—Bar to civil remedy—32-33 Vict. cap. 20, sec. 45 (D)—Validity of.

The action was for damages for an assault. The defendant had been convicted for the same assault before the stipendiary magistrate of Charlottetown, and it was contended on his behalf that he was released from all proceedings, civil or criminal, for the same cause, by 32-33 Vict. cap. 20, sec. 45 (D).

Held, that though the Parliament of Canada can legislate upon matters appertaining to Provincial jurisdiction, where such matters form an essential part and incident of some law upon a subject clearly within the legislative jurisdiction of the former, and are necessary to effectually carry out the law upon that subject, yet the plaintiff's right of action for damages was a purely civil right within the meaning of No. 13 of section 92 of the British North America Act, and entirely distinct from the criminal prosecution for the offence, and therefore that that portion of the Act which assumed to bar the right of action for damages was *ultra vires*.

Davies, for the plaintiff.

Peters, for the defendant.

MANITOBA

In the Queen's Bench.

LYNSKEY v. CANADIAN PACIFIC RAILWAY CO.

Examination of witness on pending motion—Disobedience to subpœna—Certificate of examiner, sufficiency of—Endorsement of subpœna—Sufficiency of—Notice to witness.

An order made by the referee requiring a witness to attend at his own expense and be examined on a motion pending, after disobedience to a subpœna, was

Held, not to be objectionable because made *ex parte*.

On a motion for an attachment for disobedience to a subpœna and appointment, the certificate of the examiner as to non-attendance should be read; a memorandum of the non-attendance, endorsed on the original appointment and initialed by the examiner, is not sufficient.

Held, that a subpœna is a writ within the meaning of G. O. 20, and should be endorsed with the name or firm and place of business of the solicitor who issues it.

A subpœna directed the witness to attend before the master, "at such time and place as he may appoint;" an appointment, signed by the master, specifying the time and place for attendance, was served with the subpœna.

Held, sufficient, though the appointment was obtained before the subpœna was issued.

The order required the witness to attend at three o'clock p.m. of the day on which it was made, and that service on the defendant's solicitor one hour previous to the time appointed for the examination should be considered good service.

Held, unobjectionable.

Held, also, that the affidavit of service of the subpœna should have shown that the original was produced to the witness at the time of service of the copy on him.

Held, also, that the Referee had power to order production by the witness.

On the 3rd September the plaintiff obtained an order *ex parte* from the referee, requiring W. T. VanHorne to attend at his own expense before the special examiner for the purpose of being examined as a witness in this suit, on a motion pending for an injunction, and also requiring him to produce books, documents, and papers. The time at which he was required to attend for examination was specified in the order, and was three o'clock in the afternoon of the day on which the order was made. The order further provided that service of the order on the solicitor for the defendant, one hour previous to the time appointed for the examination, should be considered good service.

An application is now made on behalf of Mr. VanHorne to set aside the order upon six grounds :—(i) That the order was made *ex parte*. (ii) That the material on which the order was granted did not warrant the granting of the same. (iii) That the subpoena referred to in the order was irregular in not naming any time or place for the attendance of the witness, and further that it was irregular in not having endorsed on it the name or firm and place of business of the solicitor by whom it was sued out. (iv) That there was not, at the date of the said subpoena, nor was there at the date of said order, nor at the present time, any motion pending in support of which the said VanHorne could be examined as a witness. (v) That the referee had no power or jurisdiction to order production, or to require the solicitor for the defendants to attend on the cross-examination of the said VanHorne at one hour's notice, or at any notice shorter than forty-eight hours. (vi) That neither the said VanHorne, nor the solicitor for the defendants had forty-eight hours' notice of the examination referred to in said subpoena, nor had the said VanHorne any reasonable notice thereof.

T. S. Kennedy, for the plaintiff.

Mills, for the defendants.

TAYLOR, J. 20th September, 1883. Dealing with the fourth ground first, I do not think I can hold that there was no motion pending, on the ground assigned by Mr. Mills. There appears to have been some irregularity or misconception about the matter. The motion came on before vacation, and was enlarged. It then appears to have been again enlarged after vacation. On the day to which it then stood adjourned the plaintiff's solicitor appeared before the Chief Justice, who adjourned the motion, no one being present to represent the defendants. On the same day the solicitor for the defendants appeared before my brother Dubuc and mentioned the motion. An entry was then made that the motion had been mentioned and that no one appeared for the plaintiff; and thereupon the motion was considered by the defendants as having lapsed.

In strictness, my brother Dubuc, as the Judge for that week, was the one before whom the motion was properly mentioned; but great looseness seems to have prevailed here in bringing on matters before any Judge present at the court house, whether the Judge for the week or not.

To hold that the motion had lapsed would serve no good end; for another notice could at once be served, and it seems doubtful whether the defendant could now have the costs as of a lapsed or abandoned motion.

No order was made dismissing the motion by my brother Dubuc, and nothing seems to have been said about costs.

The notice of motion for the injunction is not before me. If that does not state that the plaintiff intends to read, on the return of the motion, the depositions of Van Horne to be taken before the examiner then certainly there was no motion pending on support of which he could be examined. That, however, is not an objection which he could take or assign as a reason for disobeying a subpoena. It could only be taken by the defendants when his examination was proposed to be proceeded with.

The first objection cannot be maintained. It is laid down in Daniell's Practice (5th Ed.) p. 804, that the motion may be made either *ex parte* or on notice to the witness. The difference between the two modes of obtaining the order seems to be that should the witness disobey the order, then, if it had been obtained *ex parte*, an attachment cannot be issued without notice. When the order is made upon notice, the attachment for disobedience can be got *ex parte*.

Weir v. Matheson, 1 Ch. Cham. 224, was the case of an application against a party to the cause, and the Judge in his discretion declined to grant the order *ex parte*. The motion in *Waddell v. McGinty*, 2 Ch. Cham. 442, was made *ex parte*, but it was not on that ground that it was refused.

The second and third objections may be dealt with together. It is alleged that there was no certificate from the examiner proving the non-attendance of the witness upon the original appointment; and this seems to have been omitted. All that could be regarded as a certificate is a memorandum endorsed on the original appointment thus:—"This appointment not attended by Mr. Van Horne — W. L." But that is a mere memorandum or note from which a formal certificate, properly styled in the cause, could afterwards, if required, be drawn up and signed by the examiner. It is not such a certificate as should be produced or acted upon when taking steps upon which to ground process of contempt of Court. The proper form of certificate in such a case will be found in Daniell's Forms, 810, note (o).

It is also objected that the subpoena had not endorsed on it the name or firm and place of business of the solicitor by whom it was sued out, as required by G. O. 20. Production of the original subpoena shows that this was omitted. A subpoena is a writ within the meaning of G. O. 20, and should be endorsed accordingly. It is distinctly so laid down in Dan. Pr. (5th Ed.) p. 832.

The further objection is taken that the subpoena was irregular in not naming any time or place for the attendance of the witness. It does require him to attend before W. Leggo, Esq., the Master of this Court, at such time and place as he "may appoint." Along with it there was served on the witness an appointment, signed by the Master, specifying the exact time and place for his attendance. I incline to think this sufficient. In England, a subpoena for the attendance of a witness before an Examiner requires him to attend "at such times as the bearer hereof shall by advice in writing appoint," and along with it is served a notice specifying the time and place at which he is required to attend. There is not, I think, anything in the objection to the words used here, "may appoint," when

the appointment had in fact been previously made. The appointment was properly enough obtained before the subpoena was issued.

The first part of the fifth objection is that the referee had no power or jurisdiction to order production by the witness. As to the power of the referee to order production by the witness, I am not prepared to say that he could not do so. The Court, or a Judge in Chambers, could have made such an order, and the Referee can, under the general orders of this Court, make any order which a Judge in Chambers could make, with certain specified exceptions.

The rest of the fifth objection, and the sixth, cannot be maintained. The witness was not entitled to forty-eight hours' notice of the examination. See *North Wheel Exmouth Mining Co.*, 31 Beav. 628. All he can claim to have is reasonable notice, and I am not prepared to say that the notice he had was not reasonable notice.

The objection that the Referee could not require the solicitor to attend at one hour's notice, or at any notice shorter than forty-eight hours, cannot be raised on this application, which is not one on behalf of the defendants, or their solicitor, but solely on behalf of the witness. Besides, the order does not require the solicitor to attend on one hour's notice. It simply says that service of the order on the solicitor for the defendants one hour previous to the time appointed for the examination shall be considered good service, that is, service of the order; although why it should be served on the defendants' solicitor I do not see. I have no doubt of what the intention was, but it should have been expressed "shall be considered sufficient notice of said examination."

There is a further irregularity which was not referred to in the argument, but which might have been argued under the head of the second objection. It does not appear from the affidavit of service that the original subpoena was produced to the witness when he was served. In *Dan. Pr.* (5th Ed.) 803, it is said, "Service is effected by delivering a copy of the writ and of the endorsement thereon to the witness, and at the same time producing the original writ." The form of affidavit given in *Daniell's Forms* (2nd Ed.), 811, shows that the fact of the original having been shown to the witness should be stated. See also, as to this, *The Corporation of East Missouri v. Cogswell*, 2 P. R. 385.

The order should be set aside with costs, which I fix at \$5, as there is no doubt the material before the Referee was not sufficient to warrant its being issued.

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THE PERIOD FROM WHICH THE TITLE TO REAL ESTATE MUST BE TRACED BY A VENDOR THEREOF.

A QUESTION of considerable practical importance is, from what period, as between vendor and purchaser, and in the absence of express stipulation upon the point, must the vendor of real estate in this Province trace the root of title to such estate?

It is well known, that the period limited for such purpose by the Common Law of England was sixty years, until such common law rule was abrogated by the Imperial Vendor and Purchaser Act (*a*), which fixed the period of forty years as the time prescribed by law for the commencement of title.

It has indeed been suggested by a learned writer, that the reasons which gave rise to the English Common Law rule do not apply to this Province (*b*). Probably the remark was made with reference to the shortness of the period, since all Ontario titles came from the Crown, and to the fact that the Registry Laws render such a period less necessary here than in England where no such system of registry as ours prevails; but the lapse of time is rapidly removing the former reason, while the experience of conveyancers shows the difficulty of tracing many old titles

(*a*) 37 & 38 Vict. cap. 78, sec. 1.

(*b*) Taylor on Titles (2nd Ed.) p. 2.

notwithstanding the aid given by the registered records. It is submitted, that some limitation is necessary to the period through which a purchaser can compel his vendor to trace title, and that the existence of a Registry Law forms no reason for the exclusion of such a limitation.

The sixty years' limitation which formerly prevailed in England, although confessedly an arbitrary and conventional period, was a well-settled rule of English real property law, and, as such, was introduced into this Province by Provincial Enactment 82 Geo. III. cap. 1. It cannot be said that no such rule was needed in the Province at that time by reason of the shortness of the period above mentioned, and that therefore the rule was excluded as not applicable to the state and condition of the Province, for any such argument would have been equally applicable to the *Nullum Tempus* Act, which, it has been held, was introduced by the Provincial enactment mentioned (c).

"It is not easy to say how the precise term of sixty years came to be fixed on as the time for which an abstract of the title should be required. It is true, that by a statute of the reign of Henry VIII. (d), the time within which a writ of right, a proceeding now abolished (e), might be brought for the recovery of lands, was limited to sixty years; but still in the case of remainders after estates for life or in tail, this statute did not prevent the recovery of lands long after the period of sixty years had elapsed from the time of a conveyance by the tenant for life or in tail; for it is evident that the right of a remainderman after an estate for life or in tail to the possession of the lands does not accrue until the termination of the particular estate. A remainderman after an estate tail may, however, be barred by the proper means; but a remainder after a mere life estate cannot. The ordinary duration of human life was therefore, if not the origin of the rule requiring a sixty years' title, at least a good reason for its continuance. For,

(c) *Regina v. McCormick*, 18 U. C. R. 131.

(d) 32 Hen. VIII. cap. 2; 3 Black. Com. 196.

(e) In England by 3 & 4 Wm. IV. cap. 27, sec. 6, and in Ontario by R. S. O. cap. 51, sec. 75.

so long as the law permits of vested remainders after estates for life, and forbids the tenant for life, by any act, to destroy such remainders, so long must it be necessary to carry the title back to such a point as will afford a reasonable presumption that the first person mentioned as having conveyed the property was not a tenant for life merely, but a tenant in fee simple" (f).

The following extract is from a communication to the Real Property Commissioners by Mr. Tyrrell, who was afterwards appointed on the same commission.

"According to the present laws an abstract must in all cases show the title for at least sixty years, because in some few instances the estate may be recovered by the right owner, or those claiming under him, at any time within that period, after a wrong doer has obtained possession of the estate.

In many instances the commencement of title must be much more remote.

When it can be discovered that an entail has existed, the instruments by which it was created and barred must be shown, to prove that the remainders or reversions were properly destroyed; because a person entitled in remainder or reversion after an estate tail may recover the estate when the issue in tail may happen to fail at any distance of time (g).

Ancient instruments mentioned or referred to in subsequent deeds or wills must be produced, because some trust may be discovered by them, and no length of time will bar the remedy for a breach of trust, it being considered by Courts of Equity that notice of any instrument is notice of all its contents, and that a party who acquires an estate with notice of trusts shall stand in the place of the trustee and be compellable to perform them (h).

* * * * When an estate is divided, the owner of one part of it keeps the deeds, and usually gives to the owner of the other a covenant to produce them; and such deeds of covenant necessarily give notice of other early deeds (i).

(f) Williams' Real Property (14th Ed.) 478; and see Hayes' Introduction to Conveyancing (3rd Ed.) p. 241, and Sugden V. & P. 365.

(g) This evil has been partially remedied by R. S. O. cap. 108, sec. 28.

(h) But see R. S. O. cap. 108, sec. 30, which remedies the evil pointed out by Mr. Tyrrell.

(i) First Rep. R. P. Com. p. 515.

As often as a title is derived by grant from the Crown * * * the original grant should be abstracted for the purpose of shewing that no reversion or remainder was reserved by the Crown: but it is not necessary to trace the title through all the intermediate stages. At least this is the general practice, and more prevailing opinion. The reason for requiring evidence of the original grant from the Crown is that a reversion or remainder in the Crown cannot be barred by fine or recovery" (j).

The effect of Imperial Statute 3 & 4 Wm. IV. cap. 27 (k) was not to shorten the period in England as to commencement of title, which remained at 60 years notwithstanding that statute. Lord Lyndhurst, in giving judgment upon this point, says, "I am of opinion that the Statute does not introduce any new rule in this respect; and that to introduce any new rules shortening the period would affect the security of titles. One ground of the rule was the duration of human life; and this is not affected by the Statute. It is true that in other respects the security of a sixty years' title is better now than it was before; but I think that is not a sufficient reason for shortening the period" (l).

There is however this modification of the general rule which is introduced by the Vendors and Purchasers Act (m), namely, that a recital in a conveyance more than twenty years old that the grantor was seized in *fee simple* is sufficient evidence of that fact, and no prior abstract of title can be demanded except the recital shall be proved to be inaccurate. In such cases a sixty years' title is not required (n).

The foregoing remarks apply to the making of a paper title. A somewhat different rule will apply in the case of a possessory title, before discussing which we must call

(j) 1 Preston on Abstracts, 30.

(k) See R. S. O. cap. 108.

(l) *Cooper v. Emery*, 1 Ph. 388; see Hayes' Introduction to Conveyancing (3rd Ed.) p. 240 *et seq.*

(m) R. S. O. cap. 109, sec. 1 (1).

(n) *Bolton v. London School Board*, 7 Chy. D. 764; see *Allan v. McTavish*, 28 Gr. 539.

attention to the common but erroneous idea that a twenty years' undisturbed possession of land will confer a good title as against the world.

Mr. Tyrrell, in his communication already mentioned, points out some of the pitfalls which none but the most cautious conveyancers may escape even at the present day (o). He says, "No title can be considered at present to be perfectly safe. After the evidence which can be obtained has been investigated with the greatest care, and every possible means of finding objections to it have been resorted to, there will still remain some possible causes of insecurity, which no vigilance or ingenuity can discover. The principal of these are * * * the length of time after which rights may be enforced which have been suffered to remain dormant (p), the existence of remainders and reversions after estates tail (q), and of reversions in the Crown; the remedies for Crown debts (r); the want of limitation of the remedies of the Crown in many cases (s); the necessity of relying on presumptive evidence of facts (t); the doctrines of equity, especially those relating to notice (u) and the obligation of seeing to the application of money (v); and the questions of law (particularly such as arise upon the construction of wills) which are rendered uncertain by the contradictory decisions which have been made, and the practice of the Courts in which such questions are decided" (w).

(o) First Rep. R. P. Com. p. 514.

(p) See *Ketchum v. Mighton*, 14 U. C. R. 99; *Re Taylor*, 8 P. R. 207, and 28 Gr. 640; *Turley v. Williamson*, 15 C. P. 538; *Hill v. McKinnon*, 16 U. C. R. 216; *Doe d. McGilles v. McGillivray*, 9 U. C. R. 9; *Stewart v. Murphy*, 16 U. C. R. 224; *Foley v. Foley*, 26 Gr. 463; *Re Yarmouth*, 26 Gr. 593; *Greenshields v. Bradford*, 28 Gr. 299; *Chamberlain v. Clark*, 28 Gr. 454; *Hooker v. Morrison*, 28 Gr. 369; *Harlock v. Ashbury*, 18 Chy. D. 229.

(q) This ground of uncertainty has been partially removed by R. S. O. cap. 108, sec. 28.

(r) See R. S. O. cap. 93, bearing in mind that sections 1 and 2 relate only to transactions since 15th August, 1866, and that section 3 applies only to matters within the authority of the Government of Ontario.

(s) See *Regina v. McCormick*, 18 U. C. R. 131, as to the effect of the *Nullum Tempus* Act.

(t) See *McArthur v. Egleson*, 43 U. C. R. 406, and 3 App. R. 577.

(u) As to purchase for value without notice, see 3 C. L. T. 1 and 223.

(v) See *Leith's R. P. Stats.* 83.

(w) See *Re McNab*, 1 O. R. 94; *Osborne v. Rowlett*, 13 Chy. D. 774; doubted in *Re Morton & Hallett*, 15 Chy. D. 143.

Lord St. Leonards expresses the same view as follows: "It should be kept in view that [twenty] years are not a bar against all the world. The [ten] years form the regular bar and the savings are the exception, and the [twenty] years run only in the case of disabilities, in even which case not more than [twenty] years are allowed. But the [ten] years run only from the time when the first right accrued, and that in the case of a remainder, for example is not until it falls into possession, which event, in the common case of an estate for life with a remainder over, may not happen within [twenty] years of its creation" (x).

The general rule with respect to deducing a paper title as between vendor and purchaser appears to be that the vendor must show and make a sixty years' title and that *prima facie* he has then done his duty, but if in so doing he discloses any circumstances which either negative or do not warrant the inference from the transactions within that period of a good title to the fee, or if the purchaser shows such circumstances *aliunde*, the question thus raised must be cleared up by the vendor, but in the latter case the onus is on the purchaser to show that the title preceding the sixty years root of title is defective (y).

The same duty is likewise cast upon a vendor of showing and making a sixty years' title to a purchaser even though the vendor's title be wholly a possessory one. In such case he should trace the devolutions of the paper title for the sixty years preceding the date of sale, and show that the adverse possession under which he claims has been of such a nature and duration as to extinguish all claims of all persons derived through the paper title (z).

A. H. MARSH.

(x) Sugden, V. & P. 483.

(y) See Hayes' Introduction to Conveyancing (3rd Ed.) pp. 242, 243, note (a).

(z) *Ibid.* pp. 239, 240.

EDITORIAL REVIEW.

Amalgamation of the Legal Professions.

A serious discussion is taking place in Ireland upon the important subject of amalgamating the Solicitors' profession with that of the Bar. At a meeting of the Incorporated Law Society, lately held in Dublin, a resolution was introduced to the effect that it would be to the advantage of both professions, as well as of the public, that all members of the legal professions should have the same rights and privileges.

The mover of the resolution put the public first in the discussion, because (as he said) "although, if the suggested change took place, solicitors would lose nothing in point of remuneration (so far as his opinion went), the public would be large gainers. He was also inclined to think that barristers would not be injured to any appreciable extent." There is a gentle hint here that the Bar are going to be the losers, but not to any *appreciable* extent. At the conclusion of his speech the mover said, "Under the present system, a suitor has to employ a solicitor, who cannot appear on behalf of his client before a Superior Court Judge. The client has, therefore, to pay for the solicitor, his clerk, the scrivener, the printer, the barrister, and interest on the capital which the solicitor employs in his profession. Much of the expense thus entailed could be avoided by amalgamation."

Now, the saving of expense is essentially a matter of detail, and we have not seen in the whole discussion an enumeration of items upon which there is to be a saving. Unless the barrister will, in consideration of his fee, perform some of the duties of solicitor's clerk, scrivener, or printer, in addition to the advocate's share, we do not see

how the expense is to be lessened; and if he performs any of the solicitor's duties, we presume that he will manifest the ordinary instinct of a solicitor in charging the usual solicitor's fees. The only other way in which these expenses can be reduced is by the solicitors doing the advocates' work at a reduction.

It is not probable that the Bar will agree to amalgamation for the sole purpose of reducing their incomes for the benefit of the public. And we are not quite credulous enough to believe that the solicitors are anxious to make a sacrifice in consideration of the public alone. The spokesmen of the solicitors should address the marines first on that subject, and when they have convinced them, then let them turn their attention to the rest of the public. After reading of the anxiety of our learned friends for the public our memory recalls the story of Baines Carew, Gentleman:—

"Of all the good attorneys who
Have placed their names upon the roll,
But few could equal Baines Carew
For tenderheartedness and soul.

"Whene'er he heard a tale of woe
From client A or client B,
His grief would overcome him so
He'd scarce have strength to take his fee.

* * * *

"He made out costs, distrained for rent,
Foreclosed and sued, with moistened eye—
No bill of costs could represent
The value of such sympathy.

"No charges can approximate
The worth of sympathy with woe;—
Although I think I ought to state
He did his best to make them so."

Though the resolution is ostensibly based upon advantage to the public, we have seen nothing in the debate which presents any better reason for the proposed change than an increase of privileges to solicitors. If there are advantages to be gained, however, we must take into account the breaking down of the barrier which now stands between

the barrister and the client; and we believe that the Bar, as individuals, would derive a greater benefit from this, than the solicitors would derive from their right of audience in the Courts.

Greater professional efficiency is not to be hoped for as a result of the proposed change; in fact, we believe that it can be demonstrated that a perfect amalgamation would prove detrimental to both branches. One result, which is certain, would not be felt immediately, but would soon be experienced, that is, the effect on legal education. We presume that every student, or at least the great majority of them, would desire and attempt admission as well as call, and would expect to practice at the Bar as well as in his capacity of solicitor. While a student might find it easy enough to pass the necessary examinations for both professions, he would find the routine of a solicitor's office to be such a tax upon his time and energies that his theoretical education would soon become a secondary consideration. On the other hand, if he devoted his time to reading, he would not become proficient in solicitor's practice. The writer remembers having read lately, but where he cannot at this moment say, that many solicitors in England have unsuited themselves for office work by devoting themselves to the theoretical study of law, and that in this respect they are better adapted for the Bar, from which they have excluded themselves by their own choice. The result of such a state of affairs would be to lower the educational tone of the whole Bar, without elevating in any respect that of the profession of solicitor.

Actual experiment is perhaps the best test of the working of an amalgamated system. That it is not impracticable is proved by the fact that in Canada no other system is known, and we believe no other system is desired; almost every member of the profession is a barrister as well as a solicitor. But here we have men who being solicitors as well as barristers practice at the Bar alone, while others who are barristers as well as solicitors never argue a case. This is a matter of pure necessity. In all the large firms at Toronto, the seniors not only hold all the briefs of the

firm, but also hold a great many from outsiders—in fact they devote their whole time to counsel work. These men are the leaders of the Bar, are always spoken of as such, and their names are never even mentioned in connection with solicitors' work. Others of the firm take the work of chamber counsel exclusively, and spend the whole of the business day at Osgoode Hall; while the remainder do the solicitors' work of the firm and never leave their offices. It is true that many others of the profession, the bulk of whose practice is solicitors' business, hold their own briefs; but it is also true that they never, or seldom, hold any others. When they meet men who devote their whole time to practice at the Bar, it stands to reason that the contest is an uneven one.

The road to distinction at the Bar in this country lies through solicitors' practice. Business is got in that way at first. A man who has an aptitude for it holds his own briefs. He attains to some local distinction. His reputation increases, and he soon gets enough briefs to keep his time fully employed. But the early part of his career has been marked by close attention to the routine of solicitor's work, and the drudgery of managing an office, and many men who at length attain eminence at the Bar find themselves without that variety of knowledge and those various attainments and accomplishments that should distinguish gentlemen of the Bar, and without ever having devoted their time to the study and contemplation of those broad principles of jurisprudence upon which municipal law is based. We think it clear that, though a man might be in turn an excellent solicitor and an able advocate, he certainly cannot attain eminence at the Bar so long as he devotes any time to solicitor's practice. He must choose one course or the other, and follow it up, if he desires to excel. The only gain to the professions would be in breaking up some of the minor rules of etiquette which often work great injustice.

There is one phase of the subject that has not yet been noticed. The Bench derive great assistance from the arguments of counsel, who are well versed in the unwritten

practice of the Court, and who move easily in the current of proceedings established from day to day, a knowledge of which can only be attained by constant attendance in Court. Such men are also well versed in all the latest decisions, reported and unreported. They know the exact weight to be attributed to a decision; they know the manner in which it is viewed by the Court before which they plead; they know the cases which are doubted, but not overruled, and as to which the doubts have only been expressed verbally. It is manifest that the Courts will work more harmoniously with a Bar of that character than with a Bar whose other vocations prevent their frequent appearance in Court, whose acquaintance with the unwritten practice is scant, and whose knowledge of case law is derived entirely from a perusal of reports without being aided by hearing the reported cases openly discussed from day to day.

We think it evident that there is a better Bar where the professions are separate, and that there are better solicitors where they devote their whole time to that branch of the profession.

The Executive and the Bench.

In the "Speech from the Throne" at the opening of the Legislature of Ontario there occurs this passage:—"You will be pleased to know that by a recent decision of the Judicial Committee of Her Majesty's Privy Council, the right of Provincial Legislatures to regulate the traffic in intoxicating drinks is placed beyond controversy. The judgments in this case and the Insurance case, and the decision that lands escheating to the Crown for want of heirs are the property of the province, taken in connection with the observations made by the learned Judges in disposing of these cases, have had a reassuring effect on the public mind, by showing that the federal principle embodied in the British North America Act, and the autonomy it was intended to secure for the individual provinces, are likely to be safe in the hands of the Court of final resort in constitutional questions."

The case of *Hodge v. The Queen* is the one referred to. The Court of Queen's Bench for Ontario held that the clauses of the Act under which the License Commissioners passed their resolutions were *ultra vires*, because the Legislature could not delegate their law-making powers to the License Commissioners. They followed the decision of the Privy Council in *Regina v. Burah*. The Court of Appeal reversed their decision; and the Privy Council affirmed the decision of the Court of Appeal.

The Lieutenant-Governor is the representative of the Sovereign in assembling, proroguing, and dissolving the Legislature, and, theoretically, the speech is the speech of Her Majesty, expressing confidence in one of Her tribunals and, by consequence, want of confidence in another.

Whether or not there was such a grave constitutional crisis resulting from this decision that it was necessary to put these words into the mouth of the Lieutenant-Governor, is a matter for the decision of the Premier alone. Practically, he decides it, and, having decided it, he assumes responsibility for the utterance.

When we consider that the Premier was at one time a Judge, and is now Attorney-General of the Province, that the Lieutenant-Governor is a Barrister of Osgoode Hall and the son of one of the most eminent Judges that ever sat in our Court of Queen's Bench, and that the Judges, amongst other eminent persons, are usually invited to be present at the opening of the Legislature, the bad taste of publishing, under cover of an absolutely privileged utterance, what is a covert sneer at the Court of Queen's Bench and an expression of want of confidence in their decisions, is apparent. If lawyers could rise above political and party feelings in constitutional questions, and could regard the final decision of every such question as a boon to Canada, whether it enlarged or contracted the jurisdiction of the Legislatures, a better tone would pervade the whole Profession.

Happily, our Judges are universally upright, fearless, untrammelled by political feeling, perfectly competent to determine all cases that are brought before them, and not likely to be influenced in the performance of their duties

by anything save the desire and determination to do right. Happily, too, an error in judgment is matter for neither censure nor sneer. And happily, occasion never does arise for authoritative inquiry into the conduct or competency of the Bench.

Judge McDougall on the Prevention of Perjury.

Judge McDougall took a firm stand against the probable commission of perjury at the last sittings of the Division Court in Toronto—a course that commends itself, of course, for its inherent justice, and one that will meet with the approval of all right thinking men. Unfortunately, a great deal of careless swearing has been done in the Division Courts, and, strange to say, the smaller the amounts in question the greater has been the disregard of the truth. Amongst the suitors in the Division Courts, in this neighbourhood at least, it has been understood to be a settled rule that, if the defendant denied the plaintiff's claim, and the latter rested upon the plaintiff's oath alone, a nonsuit must follow. Respectable solicitors, being aware of this feeling, have frequently advised their clients to lose the amount of their claims rather than sue, fearing the very common defence of "swearing the plaintiff out of Court." It is to be hoped that this practice will be completely rooted out, and these Courts saved from the disreputable name that suitors sometimes gain for them.

The circumstances of the case in question were these. An undertaker was suing one of three sons for one-third of the price of a coffin furnished by him for their father's burial, under an agreement made by the three to pay him therefor in equal portions. Two of the brothers paid their shares; the third, this defendant, refused to pay his share. The plaintiff had sworn that the three brothers came to him in his shop and gave the order, and then and there agreed that each of them should pay one-third of the price. The two brothers who had paid their shares corroborated this testimony in every respect. At the close of the case the learned Judge asked the defendant's agent if he proposed to give any evidence in the face of this very strong

proof, to which the latter replied that he proposed to call the defendant; and to another question as to what would be the nature of the defendant's evidence, he answered that the defendant would deny what had been said; that he would admit having gone with his brothers to the undertaker's shop, but that he had not gone inside at all and was not present when the bargain was made. The learned Judge then said that he did not wish to interfere with the conduct of the case, that the agent must conduct the defence as he thought best, and if he desired to give evidence of that nature he might do so, but if the defendant denied upon oath facts which had been so circumstantially sworn to by three witnesses, he would deem it his duty to have the conduct of the defendant investigated by a competent tribunal.

The agent, who had in the meantime put his client in the witness box, then withdrew him, and a verdict was entered for the plaintiff.

Professional Morality.

In addition to the leading article on a purely legal subject with which the January number of the *Manitoba Law Journal* opens, the learned Editor has something to say upon Professional Morality, the insisting upon the observance of which should be, so he says, one of the most important functions of a Law Journal. He cites a statute of Manitoba, to the effect that if an attorney knowingly acts as the agent or partner of any person not qualified as an attorney, or in fine does any act enabling such unqualified person to practice in any respect as an attorney, he may be struck off the roll, upon complaint and proof made to the Benchers. And the Court of Queen's Bench may send the unqualified person to gaol for any period not exceeding a year. The learned Editor then proceeds, "Acting for Ontario attorneys (who are 'unqualified persons,' so far as we are concerned), upon agency terms, is as much a breach of this statute as allowing a student, residing in one town, to practice under the name of an attorney residing in another." Considering that nearly every practitioner in Manitoba

(including the learned Editor himself) qualified in Ontario before commencing to practice in Manitoba, it is refreshing to hear the Profession in Ontario dubbed "unqualified persons," even if it be technically true.

The practice of sending business from Ontario to Manitoba, to be done there on agency terms, no doubt exists to some extent; but it is not universal. The correction of the abuse lies with the Profession in Manitoba. The Law Society can reach them, but the Court of Queen's Bench cannot reach the "unqualified persons" in Ontario.

If the proper feeling existed that should exist, we would not have Ontario practitioners offering, and Manitoba practitioners accepting, business to be done upon partnership, or agency, terms.

Perhaps the Manitoba attorneys would do better by issuing circulars to the clients of the Ontario solicitors, and thus try to secure all the profits to be made. That does not appear to be within the statute; and some people think it may be done in Ontario with impunity. For a useful form, see a precedent in this number.

Bound to Rise—Can't Keep me Down.

A circular of which the following is a copy has been published and distributed amongst clients *other than* the clients of the subscribers:—

"TORONTO, 26TH JANUARY, 1884.

"DEAR SIR,—We are solicitors for creditors under the order of Reference to the Master of the Supreme Court at Hamilton, for the winding up of the Standard Fire Insurance Company.

"Claims have been placed in our hands to the amount of more than \$25,000, several of which are admitted, and some are disputed.

"We have received from the Secretary a list of claims for fire losses, and your name appears on it as a claimant for \$——.

"We think it of importance to proceed with expedition with the reference, to ascertain the liabilities of the Company, and to promote a call on the stockholders by the order of the court for the payment of the debts.

"It is probable that an Insolvent Act will be passed during the present session of Parliament, and we fear a large number of the stockholders will not be able to pay the call which will be required, and might take the benefit of an Insolvent Law.

"Please advise us when your fire loss happened ; whether your claim has been admitted or disputed ; and if your claim is disputed, whether you propose to have the question of liability of the Company decided by the Master of the Supreme Court at Hamilton in a summary manner, and at comparatively small expense, or whether you propose to apply to the Court for leave to proceed to trial in the Courts.

"We will be pleased, on application by you, to furnish any information in our power to enable you to judge of the state of affairs of the Company, and of the propriety of the course to be pursued.

"Yours truly,

"BAIN, LAIDLAW & CO."

New Law Journals.

Two new Journals commenced with the year. The *West Coast Reporter*, which has for its object chiefly the reporting of cases decided in the Western Courts of the United States, is a weekly publication, very voluminous, and giving in each issue a few pages of original matter. The editor in-chief, Mr. John Norton Pomeroy, has attained distinction as a text writer, and the Journal should succeed under his management.

The *Manitoba Law Journal and Law Reports* has put forth its initial number under the editorship of Mr. J. S. Ewart, a barrister-at-law of Osgoode Hall, and now a member of the Manitoba Bar. Without intending to assume a patronizing tone, we have much pleasure in saying that it is a most creditable production. It is in magazine form, and is composed of the journal proper in one part, and full reports of cases in the other part, with separate paging. Mr. Ewart has paid us the compliment of taking from our pages for his first number, two cases, *Reid v. Whiteford*, 3 C. L. T. 553, and *Boulton v. Shore*, 3 C. L. T. 556.

The number is made up of an article on Married Women, a few remarks on Professional Morality, a criticism of the printing of the Manitoba Statutes for 1883, some comments on Important Decisions, and an appeal for more Judges; the same to be chosen from the Manitoba Bar.

Then follow the reports.

To Correspondents.

We cannot take any notice of anonymous communications, of which we have lately received several. The name of the correspondent must invariably accompany his communication, not necessarily for publication, but as a guarantee of good faith and authenticity.

NOTES OF RECENT DECISIONS.

Miller v. Robinson, post, Occ. N. Without attempting to question the soundness of the decision of the learned Chief Justice, we may point to a case which may cause unfortunate Manitoba speculators to mourn that they did not live in the days when it was decided.

In *Saville v. Saville*, 1 P. Wms. 746, it appeared that there was a decree for the sale of an estate during the period of South Sea schemes, and Thomas Frederick was reported by the Master to be the best bidder at £10,500, which was an inflated value for the land, and to have made a deposit of £1000. A motion was made to compel Frederick to complete his purchase, but the land having in the meantime fallen greatly in value, counsel for the purchaser declared that he had elected to forfeit his deposit. A very strong argument was made against this mode of disposing of the case. Lord Chancellor Macclesfield "took notice that more had been urged by the Lord Nottingham than he had ever heard on this subject, but that he had taken good advice and well considered before he made the like order in the other cases : that according to his apprehension, a Court of Equity ought to take notice under what a general delusion the nation was at the time when this contract was made by Mr. Frederick, when there was thought to be more money in the nation than there really was, which induced people to put imaginary values on estates : that as upon a contract betwixt party and party the contractor would not be decreed to pay an unreasonable price for an estate, so neither ought the Court to be partial to itself, and do more upon a contract made with itself, or carry that further, than it would a contract betwixt party and party. On the other hand the Court might be said to have rather a greater power over a contract made with itself than with any other.

Now the deposit was supposed to be a proper pledge for securing the seller in case the intended purchaser should

afterwards go off; and had it not been sufficient, the other side might have moved to have such deposit increased; but being thought a sufficient pledge, it was punishment enough if the party that made it was to lose it, and satisfaction enough to the seller, if he was to have the benefit of keeping the deposit; that in this case the deposit was only a tithe of the purchase money: so that if the seller could get as much within £1000 of any other purchaser he would be no loser; and if he could not get so much within £1000 then it would appear to be dear sold; and consequently a bargain not fit to be executed by this court. * * *

Wherefore it was ordered that Mr. Frederick should lose his deposit of £1000 and be discharged of his contract."

The learned editor of the reports adds the following note:—"But this is not the general law of the Court: and the decision was probably founded on the general delusion of the times, as taken notice of by Lord Macclesfield."

BOOK REVIEW.

The Municipal Councillor's Hand-Book. Being a summary of the Municipal Law of Ontario, for general public use. By J. JAMES KEHOE, of Osgoode Hall, Barrister-at-law, author of "A Treatise on the Law of Choses in Action." Stratford: Pratt & Tracy, publishers, 1884.

This book is a small work, containing the provisions of the Municipal Act in a condensed narrative form. Not having intended it for Lawyers, the learned author cites no authorities. A rapid perusal of many pages of the book leads us to believe that it will form a useful hand-book for the purpose expressed in the title page, but as to its complete accuracy we do not profess to speak.

THE CANADIAN LAW TIMES.

OCCASIONAL NOTES.

In the Supreme Court of Canada,

NOVA SCOTIA.]

WOOD v. ESSON.

Obstruction in navigable waters, below low water mark—Nuisance—Trespass.

In an action of tort against W. for having pulled up piles in the harbour of Halifax below low water mark, driven in by the plaintiffs as supports to an extension of their wharf, the defendant pleaded *inter alia* that, "he was possessed of a wharf and premises in said harbour, in virtue of which he and his predecessors in title had enjoyed for twenty years and upwards before the action, and had now, the right of having free and uninterrupted access from and to Halifax harbour to and from the south side of said wharf, with steamers, etc., and because certain piles and timbers, placed by the plaintiffs in said waters, interfered with his rights, he (defendant) removed the same." At the trial there was evidence that the erections which the plaintiffs were making for the extension of their wharf did obstruct access by steamers and other vessels to defendant's wharf.

Held, reversing the judgment of the Supreme Court of Nova Scotia, that, as the Crown could not, without legislative sanction, grant to the plaintiffs the right to place in said harbour below low water mark any obstruction or impediment so as to prevent the free and full enjoyment of the right of navigation, and as the defendant had shown special injury, he was justified in removing the piles which were the trespasses complained of.

ATTORNEY-GENERAL v. FLINT.

Constitutional law—Inland Revenue Act, sec. 156—Vice-Admiralty Court—Power of Dominion Parliament to enlarge jurisdiction.

By the 156th section of the Inland Revenue Act, 31 Vict. cap. 8, the Parliament of Canada conferred jurisdiction to entertain suits and prosecutions for the recovery of penalties and forfeitures imposed by that section, on the Superior Courts of Law of the Provinces and upon the Court of Vice-Admiralty.

Held, that the enactment is *intra vires* of the Dominion Parliament; that although the Vice-Admiralty Court of the Province of Nova Scotia is not either a Provincial or a Dominion Court, the jurisdiction conferred upon it by the enactment may be lawfully assumed thereby; following *Valin v. Langlois*, 3 S. C. R. 1.

P. E. ISLAND.]

ROBBLEE v. RANKIN.

Appeal, right to—Final Judgment—38 Vict. cap. 11, sec. 25.

This was an appeal from a judgment of the Supreme Court of P. E. Island. The action was brought by respondent as endorsee of a promissory note made by the appellants in favour of one J. Auld and by him endorsed to respondent. The appellants pleaded that the amount of the note had been attached in their hands by one of Auld's judgment creditors and paid. To this plea respondent demurred on the ground that the debt was not one which could properly be attached, and on the 5th February, 1883, the Supreme Court gave judgment in favour of the respondent on the demurrer. No rule for judgment on the demurrer was taken out by the respondent. On the 19th March following an order was obtained to ascertain amount of debt and damages for which final judgment was to be entered, and judgment was signed for the respondent on the 2nd May following. The appellants then appealed to the Supreme Court of Canada.

On motion to quash for want of jurisdiction, it was contended on behalf of respondent that the appellant should have appealed from the judgment rendered on the demurrer on the 5th February, 1883, and within thirty days from that date; but,

Held, that the judgment entered on the 2nd May, 1883, was the "final judgment" in the case from which an appeal would lie to the Supreme Court.

Peters, for the motion.

Davies, Q.C., contra.

MANITOBA.]

REGINA v. NEVINS.

Court of Queen's Bench, Manitoba—Conviction by Justice—Rule absolute to quash same—Final Judgment—Right to appeal—42 Vict. cap. 39, sec. 3.

This was an appeal from a judgment of the Court of Queen's Bench, Manitoba, making absolute a rule *nisi*, and quashing the conviction made by a Justice of the Peace of the respondent for selling liquor in violation of the Canada Temperance Act, 1878, in the County of Marquette West.

The conviction and papers were brought before the Court of Queen's Bench by writ of *certiorari*.

Held, that as the judicial proceedings in this case were not originally instituted in a Superior Court of Common Law in the Province of Manitoba, the judgment was not appealable within the meaning of 42 Vict. cap. 39, sec. 3.

McLaren, Q.C., for appellant.

D. McCarthy, Q.C., for respondent.

 ONTARIO.

 Supreme Court of Judicature.

COURT OF APPEAL.

Q. B. D.]

[22ND JANUARY, 1884.]

McEWAN v. McLEOD.

Consent reference—Award—Appeal—C. L. P. Act, sec. 205—Contract—Repudiation—Delay—Measure of damages.

The judgment of the Court below, 46 U. C. R. 235; 1 C. L. T. 651, was affirmed, Cameron, J., dissenting as to the measure of damages.

J. K. Kerr, Q.C., for the appellant.

Bethune, Q.C., for the respondent.

 SPRAGGE, C.]

PETERKIN v. McFARLANE.

Notice.

The Court being equally divided, the appeal was dismissed, and the judgment of the Court below, 1 C. L. T. 443, affirmed.

Moss, Q. C., and *Scane*, for the appellants.

Atkinson, and *W. Cassels*, for the respondent.

PROUDFOOT, J.]

BAILEY v. JELLETT.

Trustee and cestui que trust—Receipt by solicitor of client's funds—Deposit to solicitor's credit in Bank—Liability of Bank—Appropriation of payments.

J. a practising solicitor, was employed by the plaintiff to receive a sum of \$6,500 about to be paid on account of a mortgage debt due the plaintiff; and it was arranged in presence of the manager of the Canadian Bank of Commerce that J. should deposit the money in that Bank. It was also agreed between the plaintiff and J. that the latter should procure a deposit receipt for the plaintiff and forward it to him. J. received the money and deposited it in the Bank to his own credit on 15th August; subsequently he drew \$3,000 and deposited it to the plaintiff's credit, taking a deposit receipt therefor in the name of the latter. He drew upon the balance of the plaintiff's money without accounting for it, and died shortly afterwards.

Held, that the Bank could not be held responsible for the misapplication of the plaintiff's moneys.

After the deposit of the plaintiff's moneys, J. recovered moneys for one S. as her solicitor, which moneys he placed to his own credit in the same account with the plaintiff's money. Between the deposit of the plaintiff's money and the death of J. the amount at his credit in this account always exceeded the amount deposited by him for S.

Held, that all the moneys so deposited by J. were impressed with a trust, and might be followed into the hands of the Bank; but, as between the plaintiff and S., that S. had a first charge upon the amount for the whole of her deposit and that the balance was to be applied upon the plaintiff's claim.

The Bank claimed the right to charge against the whole amount in question, prior to the claims of the plaintiff and S., cheques and notes of J. maturing and presented to them after they had received notice of J.'s death.

Held, that they had no right so to do: and, having insisted on this claim in their defence and appeal, the court deprived them of their costs.

The judgment of the Court below reversed.

H. J. Scott, Q.C., for the appellant S.

S. H. Blake, Q.C. and Crickmore, for the appellants, the Bank.

Moss, Q.C., for the plaintiff, respondent.

Northrup, for the administratrix of J.

High Court of Justice.

QUEEN'S BENCH DIVISION.

[THE DIVISIONAL COURT, 16TH FEBRUARY, 1884.]

WILCOCKS v. HOWELL.

Libel—Privileged communication—New Trial.

The defendant and others signed a petition to the license commissioners of the City of Hamilton praying that a license might not be granted to the plaintiff, and stating that his tavern was one of the worst drinking holes in the county, that it was kept very disorderly, that there was no suitable accommodation and that the landlord was very much given to drinking.

Held, that the occasion of the presentation and publication of the petition was privileged, but not absolutely privileged, and that the *onus* lay on the plaintiff to prove express malice.

The jury gave a verdict for the plaintiff for \$1,000, and the court was of opinion on the evidence, verdict, and general merits that there should be a new trial, Cameron, J., dissenting.

Robertson, Q.C., for the plaintiff.

Osler, Q.C., for the defendant.

RICE v. GUNN.

Principal and agent—Gambling contract—Dealing in options—Settling differences—Onus of proof—Proof of foreign law—Admissibility of evidence after trial.

The defendants, merchants at Toronto, employed the plaintiffs, brokers at Chicago, to buy and sell grain in the Chicago market on margin, and the latter performed services for the defendants and advanced money for them in the purchase and sale of grain for which they now sued. The defendants received some profits from the plaintiffs on the transactions, but subsequently refused to settle losses. The Court, assuming the law of the State of Illinois to be that if the contract was to deal in such a way that the only differences in prices should be settled according to the rise and fall of the market the contract would have been a gambling contract and illegal,

Held, that it lay upon the defendants, after having received profits from the transactions, to establish clearly that differences only were to have been settled, and this defence not having been clearly proved, judgment was given for the plaintiffs, reversing the judgment of Patterson, J.A.

After judgment at the trial, but prior to the argument before the full Court, the defendants put in a report of a case bearing upon the question

decided in the Supreme Court of the United States of America, verified by affidavit.

Held, admissible, in the discretion of the Court.

Where the opinions of experts upon foreign law are conflicting, the Court will examine for itself the decisions and text books of the foreign country, to endeavour to arrive at a satisfactory conclusion.

Osler, Q.C., and *H. W. M. Murray*, for the plaintiffs.

Falconbridge, and *W. Barwick*, for the defendants.

ROBERTSON v. THE HAMILTON PROV. & LOAN SOCIETY.

Mortgagor and mortgagee—Short Forms Act—Distress for arrears—Leave and license.

The defendant company were mortgagees of the plaintiff's land under a mortgage made in pursuance of the Short Forms Act, which contained the following clause:—"Provided that the Society may distrain for arrears of instalments." The principal money and interest were added together, and by the terms of the mortgage the amount was repayable by equal annual instalments. There was a covenant to pay interest on instalments in arrear. The defendant company distrained for the amount of instalments in arrear, and interest thereon. By arrangement the bailiff sold the goods in the plaintiff's shop from day to day, plaintiff assisting, and a larger sum was thus obtained than if they had been sold by auction. The balance realized over the amount due the defendant was paid to the plaintiff.

Held, affirming the decision of *Osler, J.*, upon the evidence that the plaintiff by the mortgage deed and his assent to the distress and sale licensed the selling of the goods, but that he was entitled to nominal damages for the sale of those which were not necessary to satisfy the demand, but that as they had the right to distrain for instalments in arrear only, and not for interest thereon, the plaintiff was entitled to judgment for the difference between the instalments and the amount distrained for.

Per *Osler, J.* The substitution of the word "instalments" for "interest" in the short form did not take it out of the statute.

HATELY v. THE MERCHANTS' DESPATCH CO. *et al.*

Carrier—Bill of lading—Condition against liability for negligence—Construction of—Judgment against three defendants—Separate appeals to Court of Appeal and Divisional Court.

The plaintiff, consignor, consigned butter to his co-plaintiffs, consignees, in England, and shipped it by the defendant companies, under a contract with the defendant Despatch Company, on through bills of lading endorsed by the plaintiff to his co-plaintiffs, consignees, in England, at a through rate paid to the Despatch Company, apportioned amongst the defendants by agreement.

The butter was carried by the defendants, the G. W. Railway Co., from London, Ont., to New York, and there delivered in good condition on a barge belonging to the defendants, the G. W. Steamship Co. It remained on the barge, through the negligence of the latter company, for some days, during very hot weather, whereby it was damaged, and it was received by the consignees in the damaged condition. By clause 8 of the bill of lading it was stipulated that "the consignees or party applying for the goods are to see that they get their right marks and numbers, and after the lighter-man or wharfinger or party applying for the goods has signed for the same, the ship is to be discharged from all responsibility for mis-delivery or non-delivery and from all claims under this bill of lading."

Osler, J., who tried the case, found in favour of the plaintiff, and gave a general verdict against all the defendants.

Held, per Hagarty, C.J., affirming the decision of Osler, J., that the condition on the bill of lading should, notwithstanding the general words at the conclusion, be restricted in its scope to cases arising from mis-delivery or non-delivery, and did not relieve the defendants the Steamship Company from liability for actual negligence.

Per Cameron, J. The condition in the bill of lading, by its concluding general terms, absolved the defendants from liability for the negligence complained of.

Per Armour, J. It appeared that the defendants the Despatch Company had given notice of appeal to the Court of Appeal from the decision of Osler, J., before the other defendants appealed to this Court. Where there is a general judgment against several defendants, Rule 510 does not permit them to sever and appeal to different Courts, but they were all bound to appeal to the tribunal to which the defendant taking the first step had appealed, and on this ground the appeal should be dismissed.

REGINA v. DODDS.

Lottery Act, C. S. C. cap. 95—Giving prizes for guessing number of beans in glass jar—Conviction.

The defendant, being the proprietor of a newspaper, advertised in it that whoever should guess the number nearest to the number of beans which had been placed in a sealed glass jar in a window on a public street should receive a \$20 gold piece; the person making the next nearest guess, a set of harness, and the person making the third nearest guess, a \$5 gold piece; any person desiring to compete to buy a copy of the newspaper and to write his name and the supposed number of the beans on a coupon to be cut out of the paper. The defendant was convicted of a contravention of C. S. C. cap. 95.

Held, that, as the approximation of the number depended as much upon the exercise of skill and judgment as upon chance, this was not a "mode of chance" for the disposing of property within the meaning of the Act.

Per Hagarty, C.J. The Act applies to the unlawful disposal of some existing real or personal property. In this case there were no specific gold coins, nor was there any particular set of harness, to be disposed of, which might have been forfeited pursuant to section 3 of the Act, and therefore the conviction was bad on that ground.

Fenton, for the Crown.

Murdoch, for the defendant.

HERRING v. WILSON.

Distress for rent—Seizure of goods subject to chattel mortgage—Liability of tenant to protect chattel mortgages.

B. leased certain premises to Y., who assigned the lease to P. and sold to him the goods on the premises, subject to a chattel mortgage to the plaintiff and others. P. then gave a chattel mortgage to the plaintiff and others upon these goods to secure to them the purchase money thereof. On 1st February, the defendant took possession of the premises under a verbal agreement with P. that the latter should assign the lease to him, and it was so assigned on 4th June following. There was no evidence as to what bargain there was between P. and the defendant as to the goods, but the goods remained on the premises without the request of the defendant. The plaintiff and his co-mortgagees subsequently took possession of the goods under their chattel mortgage; but on the same day, before they were removed, the landlord seized them for rent. Upon the promise of the plaintiff to pay the rent, the landlord withdrew. The plaintiff having refused to keep his promise by paying the rent, the landlord brought an action against him and compelled payment. The plaintiff now sued the defendant to recover the amount so paid.

Held, that there being no privity of contract or estate between the defendant and the plaintiff, and the goods not having been originally placed on the premises at the tenant's request, and having in fact been in the possession of the plaintiff when seized, the defendant was not bound to protect them against the seizure for rent.

Bethune, Q.C., for the plaintiff.

Clute, for the defendant.

SCOTT v. BENEDICT.

Vendor's Lien.

W. S. being indebted to R. & Co., who held a saw-mill with timber licenses, lands, etc. belonging to W. S., in their own name, as security therefor, wrote to them that he had arranged with his son, W. A. S., for the transfer to him of his business, and upon his arranging with R. & Co. the liability of W. S., that was, was entitled to be placed in the position

of W. S. with respect to the property held by R. & Co., and that on settling that liability they were to convey to W. A. S. By a subsequent agreement W. S. agreed with W. A. S. that the latter was to pay off the liabilities of W. S. in two years, upon which W. S. was to transfer to him other lands than those held by R. & Co. Subsequent advances were made by R. & Co. to W. A. S. The defendant, B., afterwards paid off R. & Co., and R. & Co. and W. A. S. joined in conveying to the defendant, B., the property in question. The defendant, B., subsequently made advances to W. A. S., and to his assignee on his becoming insolvent. To some of these advances the plaintiffs, the executors of W. S., agreed by an instrument, under seal, stipulating that it should not affect their lien against any one but the defendant, B. They now claimed a lien on the lands for the amount of the liabilities of the testator, W. S., which W. A. S. had agreed to pay as the consideration for the transfer to him of the business.

Held, affirming the judgment of Galt, J., Cameron, J., dissenting, that no such lien existed, even if the defendants had notice of the transaction between W. S. and W. A. S.

[HAGARTY, C.J., 4TH FEBRUARY, 1884.]

REGINA v. SMITH.

Municipal by-law—Weighing and Measuring Wood—Delivery of Wood in specified waggons—Ultra vires.

The municipal council of the City of Hamilton passed a by-law that no person should, upon or after sale thereof, deliver any stove wood in or from any waggon &c., otherwise than in or from a waggon &c., of a certain capacity, the sides of which should be constructed of slats of a certain width and a certain distance apart from each other. The defendant was convicted of a breach of the by-law.

Held, that the by-law was *ultra vires*, for though the municipal council had the right under the Municipal Act, sec. 466, to provide for the weighing or measuring of wood, they had no power to enforce delivery, upon or after sale, in a particular kind of waggon.

W. H. P. Clement, for the defendant.

Mackelcan, Q.C., contra.

[ROSE, J., 31ST DECEMBER, 1883.]

SRIGLEY v. TAYLOR.

Penalty—Forfeiture—Action for—The Election Act of Ontario.

In an action pursuant to R. S. O. cap. 10. sec. 182 against an agent for the sale of Crown Lands to recover a penalty alleged to have been incurred by voting at an election of a member to the Legislative Assembly, contrary to sec. 4 of the Act.

Held, overruling a demurrer to the statement of claim, that though forfeitures and penalties belong to the Crown unless otherwise disposed of, the sum declared to be forfeited, by sec. 4 of the Act, for a breach thereof, is a penalty within the meaning of sec. 182, s.-s. 1, for which a popular action may be maintained.

Tilt, Q.C., for the demurrer.

Arnoldi, contra.

COMMON PLEAS DIVISION.

[THE DIVISIONAL COURT, 9TH FEBRUARY, 1884.]

PAGE v. PROCTOR.

Contract—Sale of goods—"Ordinary sections"—Right of selection—Parol evidence, admissibility of—Usage of trade.

The plaintiffs, in the beginning of January, 1880, had purchased through C. & G., of Montreal, a quantity of rails, and, requiring 2,000 tons more, negotiations were entered into between H., the plaintiffs' agent, C. & G., and the defendant, which resulted in an advice note being signed on 14th January by C. & G., addressed to the defendant, advising him that they had sold to the plaintiffs, on the defendant's account, 2,000 tons of rails (56 lbs.) etc., at £8 18s. 9d. stg. per ton, payment to be made in London against consignments, and credit to be there opened with approved bankers in favour of the defendant's agent. The defendant, who was then in Montreal, signed a sale note in similar terms to above. The sale was immediately communicated to the plaintiffs, who signed a confirmatory note, adding the words that the make should be either Ebbville or Moss Bay, and wrote across its face that the rails were to be 56 lbs., ordinary section and specification. This confirmatory note was not communicated to the defendant until after this action was brought. The credit was opened by the plaintiffs in accordance with the contract. The plaintiffs and defendant were dealers in, and not manufacturers of, rails. The defendant, at the time the contract was entered into, had purchased rails from a firm in England, who were also dealers and not manufacturers, and who had arranged with the manufacturers at Ebbville for the manufacture of rails of a section known as "Hamilton and North-Western," and which came within the terms "ordinary sections," which embraced a number of different kinds of sections; and these were the rails which the defendant intended delivering to the plaintiffs. The plaintiffs required a section called "Sandberg," which also came within the term "ordinary sections," and when they discovered that the defendant's rails were Hamilton and North-Western, they endeavoured to get the defendant to change the section, which the defendant was unable to do. The plaintiffs allowed the rails to be shipped to them and to be paid for under the credit, and it was not until afterwards that they notified the defendant of their refusal to accept, contending that under the contract they had the right to select the rails.

Held, that even if the terms of the confirmatory note were embraced in the contract, the contract did not *per se* give the plaintiff the right of selection; and that parol evidence was not admissible to show that by usage of trade they had such right; but, even if admissible, the evidence failed to establish such right, and especially so as the parties were dealers, and not manufacturers, and in view of the plaintiff's conduct. The contract was therefore performed by the sections delivered.

Hector Cameron, Q.C., and *Bethune, Q.C.*, for the plaintiffs.
McCarthy, Q.C., and *Robertson, Q.C.*, for the defendant.

REGINA v. MATHESON.

Conviction—Playing at game of faro—Recovery of penalty by action—
12 Geo. II. cap. 28—27 Geo. III. cap. 1.

The defendant was convicted by the police magistrate of the City of Toronto for playing at a game of cards called faro, contrary to the Statute 12 Geo. II. cap. 28, and was fined £50 stg., and in default of payment sentenced to ten days' imprisonment.

Held, that, under the subsequent Act, 27 Geo. III. cap. 1, prosecutions before Justices of the Peace were put an end to, and in lieu thereof the penalty was to be recovered by an action of debt, etc. The conviction was therefore quashed.

Quars, whether the defendant could not have been convicted under the provisions against gambling contained in the Municipal Act, 46 Vict. cap. 18, sec. 490, s.-s. 33, and the by-law in force in the municipality.

Fenton, for the Crown.

McMichael, Q.C., and *Bigelow*, for the defendant.

BRADLEY v. McINTOSH.

Libel—Production of documents relating to public service—New trial.

In an action for libel and slander, the plaintiff's counsel insisted on the production of certain anonymous letters written by the defendant to a department of the Ontario Government, relating to the licensing of a public house. The head of the proper department declined to produce the letters, on the ground that their production would be injurious to the public service, and that they were therefore privileged. The learned Judge at the trial, as the plaintiff's counsel insisted upon the production, ordered them to be produced, but stated that if the Court should hold that the production was not compellable, any verdict recovered would go for nothing. The letters were then produced and read. The learned Judge charged the jury that the letters could not be looked at as evidence of a libel, but might be regarded as evidence of malice. A verdict was found for the plaintiff.

Held, that the question whether the production of documents is injurious to the public service, must be determined, not by the Judge, but by the head of the department having the custody of the papers; and if he is in attendance and states that in his opinion the production of the documents would be injurious to the public service, the Judge ought not to compel the production of them.

Under the circumstances, the Court set aside the verdict and granted a new trial.

J. K. Kerr, Q.C., for the plaintiff.

Delamere, for the defendant.

DONOVAN v. HERBERT.

Trespass—Possession.

The actual occupation of land by a person who has the legal title is not necessary to enable him to maintain trespass. It is sufficient if he enter upon the land so as to put himself in legal possession of it.

The plaintiff, the owner of certain land, entered thereon, and put up a board which stated that the land was for sale.

Held, that this was an act which showed the intent of the plaintiff to be to claim the land as owner, and that it constituted a sufficient entry to vest the legal possession in him so as to enable him to maintain trespass.

McMichael, Q.C., for the plaintiff.

McCarthy, Q.C., and *O'Donohoe, Q.C.*, for the defendant.

NELLES v. MALTBY.

Assignment in trust for creditors—Partnership and separate creditors—Execution of assignment—Omission of goods therefrom—Preference.

Under an assignment in trust for creditors, the assignee was directed to distribute the proceeds of the property assigned "rateably and proportionably among all the creditors of the assignors in payment and satisfaction as far as possible of their just debts, having due regard to the rights of partnership creditors and private creditors, and distributing the same as between them according to law."

Held, that the assignment was valid; that it provided for the payment both of partnership and separate creditors out of the respective estates appointed for that purpose according to law, the meaning of which is well known in insolvency proceedings, in administration of estates by the public Courts, in the execution of writs by the Sheriff, and in every day proceedings under trust and composition deeds.

The assignment was executed by one of the partners for a co-partner, under verbal instructions from the co-partner, given before leaving for

England, to sign for him if an assignment became necessary, and also under a cablegram received from him in England to the same intent.

Held, that though authority to execute a deed must be by deed, this would not apply to the goods in the assignors' store, of which the assignee took actual possession, as to which the verbal authority would be sufficient; nor, for like reason, to goods warehoused for and held by a Bank, where the assignee notified the Bank of the assignment and they agreed to hold the surplus for the assignee after payment of the Bank's claim.

Held, also, that the omission of some part of the assignors' estate from the assignment did not render it invalid.

Held, also, the postponing of the assignment until certain favoured creditors had obtained judgment and execution, did not invalidate the assignment.

Gibbons, for the plaintiff.

Street, Q.C., for the defendant.

BROOKE v. McLEAN.

Wall—Erection on plaintiff's land—Damages—Trustee—Parties.

The plaintiff was the surviving trustee, under the will of J. B., of certain land on which was erected a two-storey brick house, the westerly wall of which formed the easterly boundary of the defendant's land. L., who owned the land immediately adjoining the plaintiff's land on the west, leased the same to F., who erected thereon a large brick building, using the plaintiff's westerly wall as a party-wall, inserting joists therein, and building on the wall so as to raise it two storeys higher, and thereby weakening it. F. mortgaged to a Building Society which, on default, sold to the defendant.

Held, that the plaintiff, under Rule 95, was entitled to maintain an action, as representing the estate, without making the *cestuis que trustent* parties, and that he was entitled under the circumstances to a judgment that the defendant should desist from further using in any way whatever the wall built on the top of the plaintiff's wall or the ends of the joists which he had put in the plaintiff's wall.

Held, also, that the plaintiff was entitled to recover in damages the expense of removing the said wall so erected on his wall, which were assessed at \$105; and the damages occasioned by his wall being weakened, which were assessed at \$10, making in all \$115; but that the plaintiff could not recover damages for the loss of a sale of the property by reason of the erection.

J. B. Clarke, for the plaintiff.

W. Cassels, Q.C., and *A. C. Galt*, for the defendant.

SUTHERLAND v. PATTERSON.

Principal and surety—Guarantee—Promissory note—Negotiability.

The defendant wrote to the plaintiff, referring to J. S., the person whom he desired to assist, and said, "He informs me now that I could help him by pledging myself to you, that you might give him a letter of credit on Montreal; and I now say if you will assist him in that way to \$7,000 or \$8,000, I will become responsible to you for the like amount in any manner you may wish, as I am fully satisfied that John will protect and take care of any one who would be generous enough to assist him."

Held, not a continuing guarantee. An instrument in the following form was signed by the defendant: "Three years after date I promise to pay to the order of J. S. \$5,000 at the office of Mr. A. S. Cannifton, value received. This note is given as collateral security for a guarantee of \$5,000 given to J. S. by A. S."

Held, not a negotiable promissory note.

Bethune, Q.C., for the plaintiff.

Northrup, for the defendant.

 CHANCERY DIVISION.

[BOYD, C., AND PROUDFOOT, J., 21ST FEBRUARY, 1884.]

SHUPE v. SHUPE.

Leave to appeal—Delay—Time, computation of—Pronouncing judgment, meaning of—Rule 523.

The party in whose favour a judgment has been pronounced has a vested right therein, and when the time for appealing has elapsed the onus lies upon the other side of satisfying the Court that he should be allowed to appeal, either by excusing the delay or by showing that the successful party has raised some equity against himself. An offer of compromise made to the successful party and pending when the time for appealing has elapsed raises no equity against the latter.

Time begins to run under Rule 523 from the oral delivery of the judgment, and not from the time of entering it.

This cause was tried before Ferguson, J., at Chatham, on the 19th November, 1883, and judgment was pronounced in favour of the plaintiff on the 21st November. On the same day, and the day following, overtures of settlement were made by the defendant through the medium of Robert

Wilson, the father of the plaintiff's solicitor. The affidavits were conflicting, but it was sworn, and not denied, that at an interview between the defendant, Robert Wilson, and the plaintiff's solicitor, on the 22nd November, the defendant offered \$300 in full settlement; the plaintiff's solicitor said that that would barely cover costs, and, though he would communicate the offer to his client, he did not think it would be accepted; and he further said, that he wished to deal with the defendant's solicitor only; and Robert Wilson warned the defendant that he must not let the time go by for appealing. The plaintiff's solicitor, on the same day, the 22nd November, called upon the defendant's solicitor and the subject was mentioned, but their affidavits did not agree as to what had passed between them; but it was not denied that the defendant's solicitor said he intended to appeal. On 30th November a notice of settling minutes of the judgment was served upon the managing clerk of the defendant's solicitor, at the latter's office, but it did not come to the knowledge of the solicitor for some time afterwards. On 1st December the judgment was settled, no one attending for the defendant. On the same day an appointment to consider the judgment, tax costs, and proceed with the reference, was served in the same way. The Divisional Court commenced their sittings on 6th December, 1883. On 10th December, 1883, notice of motion was given for leave to appeal to the Divisional Court, notwithstanding that the time for appealing had elapsed, based upon affidavits sworn on the 7th December, in which the defendant relied on the offer of settlement made by him, and pending when the time had elapsed for appealing, as a sufficient excuse for the delay. The motion was enlarged to the present sittings, and in the meantime the defendant set the appeal down, without leave, for these sittings.

Langton, for the defendant, read Rule 523, which declares that an appeal to the Divisional Court shall be made to the first sittings of the Court "which begins not less than ten days after the pronouncing of the judgment." He argued that it was fairly a matter of doubt, on the reading of this rule, whether the time for appealing should run from the oral delivery of judgment, or from the time of entering judgment pursuant thereto. He contended that *McNeill v. McGregor*, 3 C. L. T. 309, was an authority in favour of the latter construction. If that were the correct construction the defendant was in time for the present sittings, for which the cause had been set down as a matter of precaution, as judgment was entered on the 1st December, 1883. If not, then the affidavits showed that the defendant was led to believe his offer would be entertained, and that having been rejected he should be allowed to appeal.

E. Douglas Armour, for the plaintiff, contended that the plaintiff had a vested right in his judgment, which ought not to be disturbed unless the defendant showed some good reason for his delay, or that the plaintiff had done something to raise an equity against himself: *Rumohr v. Marx*, 3 C. L. T. 31. As soon as the judgment was pronounced a duty was cast upon the defendant to be vigilant in appealing. The plaintiff was under no obligation to take any steps. The offer made by the defendant in this case was not enough to shift the responsibility from him. If it were held otherwise an offer of settlement would be almost equivalent to a notice of

appeal. The fact of the defendant's solicitor saying he was going to appeal was not sufficient: *In re New Callao*, L. R. 22 Chy. Div. 484 approved in *In re Manchester, etc.*, L. R. 24 Chy. Div. 488. Opinion has fluctuated to some extent in England as to giving leave to appeal, and Spragge, C., recognizing this in *Dunnard v. McLeod*, 8 P. R. 343, refused to be bound by the English decisions.

Langton, in reply, said that the cases cited for the plaintiff showed that there was no hard and fast rule, but each case must depend on its own circumstances.

Boyd, C.—Judgment was pronounced on 21st November. That gave certain rights to the plaintiff, and time began to run from the pronouncing of the judgment. On 22nd November there was an interview between the defendant, R. Wilson, and the plaintiff's solicitor. The parties are not agreed as to who originated it, but that is not material. There was a discussion, and the solicitor said the offer was entirely insufficient. Then it was mentioned and discussed and emphatically talked over that time must not elapse for appealing. Mr. Pegley, the defendant's solicitor, was also told on the same day that the offer was not sufficient. He was not told that the time for appealing must not elapse, but the client was so told, and it is to him that the delay is to be attributed. A whole week elapsed. It rested upon the defendant and his solicitor to see what the state of affairs was. The parties lie by for a week without explanation of the delay which cannot be imputed to the plaintiff. The onus is on the defendant of explaining the delay, and he has not done so, and no equity arises out of the conduct of the plaintiff to entitle the defendant to disturb him. The motion should be dismissed with costs.

Proudfoot, J.—Time began to run from the 21st November. After judgment the plaintiff had a vested right in this judgment, and any indulgence to be granted after that is less readily granted than if a prompt application had been made. The rule is not unalterable. Still it is undoubted that a party with judgment in his favour has a presumption in his favour. There is no explanation of the delay, and I agree that the motion should be dismissed with costs.

[*Boyd, C.*, 14TH FEBRUARY, 1884.]

THOMPSON v. CANADA FIRE AND MARINE INS. CO.

Company—Fraudulent transfer of shares—Duty of shareholder.

A transfer of shares by directors to persons of no substance held invalid, except in so far as subsequently ratified by the shareholders. It is not the duty of a shareholder to investigate such action of the directors; knowledge must be established, either expressly or by necessary implication, before the presumption of acquiescence can be raised against a dissatisfied shareholder; but a mere protest on the part of a shareholder, on being made

aware of what has been done, is not sufficient to protect him from the consequences of remaining inactive; he must take active measures to prevent or undo the transfer.

Bethune, Q.C., Mackelcan, Q.C., and Moss, Q.C., for the plaintiff.

McCarthy, Q.C., Laidlaw, and Teetsel, for the defendants.

[20TH FEBRUARY, 1884.]

In re TITUS, a solicitor.

Solicitor—Misconduct—Demanding money to bribe jury.

W. having been indicted for a criminal offence was told by T., her solicitor, on the eve of her trial, that there were other ways besides "legitimate ways to manage these things," and he obtained from her at two different times sums of \$100 each "to salt the jury with," as he said. On applying to her for the second \$100, he told her that only three jurors had been "fixed" with the first \$100. On the reference to the Master to tax his bill, he gave no account of how the money was disbursed, except that it had been handed to a third person to secure his assistance in the defence, and he was, or pretended to be, unable to say what amount he had received. On this application, he denied generally any conversations with reference to bribing the jury, but B., the messenger whom he had sent for W., another witness, and W. herself all swore that the subject of "salting the jury" was broached on the occasion of paying the first \$100, and that on the second occasion T. had said that "three jurors had been fixed all right" with the first \$100.

Held, that T.'s line of defence was not trustworthy, and that he had not vindicated his conduct, and an order was made striking him off the rolls.

Upon the presentation of this petition, it was urged by Counsel for the solicitor that he had the right to a trial of an issue, so that the witnesses might be examined in open Court.

Held, that that rule applied only when the affidavits were conflicting, and the Court was in doubt as to the truth.

Marsh presented the petition.

J. Hoskin, Q.C., argued the motion by direction of the Court.

S. H. Blake, Q.C., for the solicitor.

[FERGUSON, J., 26TH JANUARY, 1884.]

SHANAGAN v. SHANAGAN.

Voluntary conveyance—Improvidence—Setting aside.

A conveyance from the plaintiff, an aged man, to the defendants his sons, under which the defendants took the plaintiff's farm and farming stock, subject to a rental payable to the plaintiff for life and his support, and under which the defendants occupied and improved the farm, was set aside for improvidence on the following terms:—The defendants to be repaid money expended for permanent improvements, moneys paid by them on account of a mortgage existing before their conveyance, rents paid to the plaintiff, and the value of his support; and to be charged with deteriorations in the property, rents and profits received by them, and occupation rent and the value of the chattel property taken by them under the conveyance.

McLACHLIN v. USBORNE.

Will, construction of—Power of trustee to appoint successor—Trustees and Executors Act—Construction of.

By will dated 27th June, 1871, a testator devised certain lands to his sons, charging them with the payment of certain sums to his daughters, these sums to be paid by the sons to the testator's widow, who was to hold them upon trust to pay the income to the daughters. The will contained the following clause:—"At the death of my wife, I direct that the trust premises shall be held by my said sons upon the like trusts as are herein declared respecting the same, unless my said wife shall have previously appointed by will or otherwise any other person or persons to be a trustee or trustees in her place, which I hereby authorize and give her power to do." On 5th November, 1873, the widow assumed to appoint the defendants trustees in her place, and conveyed to them the trust estate. Afterwards, by deed of 6th October, 1877, the widow again appointed the defendants trustees in her place, and conveyed to them the trust estate.

Held, that under the will alone the widow had no power to appoint a trustee to succeed her during her lifetime, but could appoint one to succeed her at her death only, and therefore the appointment of 5th November, 1873, was void; but that by 40 Vict. cap. 8, sec. 3, she was empowered to appoint a trustee to succeed her upon her desiring to be discharged (as she did in this case) and therefore the appointment of the 6th October, 1877, was valid.

Held, that the Act was not retrospective so as to make valid the appointment of 5th November, 1873.

Held, also, that the Act applies as well to all trustees who were trustees at the time of its passing as to trustees appointed thereafter.

The will declared that the shares of the testator's daughters should be for their separate use and free from the control of their husbands, respectively. The widow appointed the husband of one of them to be one of two trustees.

Held, unobjectionable, though the Court in appointing trustees might not have selected the husband of the *cestui que trust*.

Bethune, Q.C., Cassels, Q.C., and W. H. Walker, for the plaintiffs.

Gormully, for the defendants.

IN CHAMBERS.

[GALT, J., 29TH JANUARY, 1884.]

DOERR v. RAND.

Security for costs—Præcipe order—Setting aside—Stay of proceedings.

The judgment of the Master in Chambers, ante, p. 91, was affirmed.

[PROUDFOOT, J., 4TH FEBRUARY, 1884.]

In re WOODS; WHITTRICK v. WOODS.

Partition and administration—Commission, allowance of.

Partition and administration under one order. The Local Master at Woodstock treated the proceeds of realty and personalty as funds separately realized, and accordingly computed the commission at the usual rate on each fund. The total commission thus fixed exceeded a commission computed on the proceeds when treated as one fund.

On the motion for distribution, the question of the correctness of this computation was raised.

PROUDFOOT, J.—The Master was in error. The proceeds of the realty and of the personalty should be added together and commission computed thereon as on one sum realized.

R. S. Cassels, for the plaintiffs.

J. Hoskin, Q.C., for the infants.

H. C.

[FERGUSON, J., 24TH JANUARY, 1884.]

STANDARD BANK v. WELLS.

Appeal from Master in Chambers—Time, extension of—Judgment under Rule 80—Endorsement for special relief.

The Master in Chambers made an order on 14th January, from which the defendant appealed. Upon the *ex parte* application of counsel for the defendant for leave to bring on the appeal on Thursday, the 17th January, Proudfoot, J., directed the appeal to be set down for Monday, the 21st January. No order was taken out extending the time for appealing. The objection that the appeal was not brought on within eight days from the making of the order, pursuant to Rule 414, was over-ruled.

A motion was made for judgment under Rule 80 upon a writ specially endorsed for the amount of a bill of exchange, and claiming, in addition, that certain conveyances and assignments should be set aside as fraudulent.

Held, reversing the order of the Master in Chambers, that the plaintiffs were not entitled to an order for judgment under Rule 80 upon a writ endorsed for other relief than the recovery of a debt or liquidated demand.

Hoyles, for the appeal.

Cassels, Q.C., contra.

[THE MASTER IN CHAMBERS, JANUARY, 1884.]

RIHEL v. LIVINGSTONE.

Taxation of costs—Action against joint promissors—Final judgment by default against one—Trial and verdict.

Action against L. and K., joint makers of a promissory note. Final judgment was signed against L., under Rule 204, for default of defence, and the general costs of the action, down to the signing of this judgment, were taxed against him. The action went to trial against K., the other defendant, and judgment was obtained against him with costs.

Mr. Thom, taxing officer, ruled that, by taxing costs of the action upon signing final judgment against L., the plaintiff had waived his right to recover from K. the costs incurred up to final judgment against L. and so taxed against him, though, if interlocutory judgment only had been signed against L., the whole costs of the action might have been subsequently taxed against both defendants.

The plaintiff then, on showing that the defendant L. was worthless, and that no steps to enforce the judgment against him had been taken, obtained from the Master in Chambers *ex parte* an order vacating the judgment against L. in so far as it directed payment of costs. The taxing officer thereupon allowed as against K. the whole of the general costs of the action, and also costs as of signing an interlocutory judgment against L.

R. S. Cassels, for the plaintiff.

H. J. Scott, Q.C., for the defendant K.

H. C.

MANITOBA

In the Queen's Bench.

MILLER v. ROBINSON.

Sale of Land—Alleged misrepresentation—Executed contract—Rescission—Evidence.

The plaintiffs complained that they had been induced to purchase land through fraudulent misrepresentations, and it appeared that the contract had been executed by payment of part of the purchase money and giving a mortgage for the balance, and that the evidence of misrepresentation was that of the plaintiffs only, and was contradicted by the defendants.

Held, that, in the absence of evidence to corroborate the plaintiffs' statement, the bill should be dismissed.

On 13th March, 1883, the plaintiffs purchased from the defendant, Fred. W. Robinson, through the other defendant as his agent, lots 9 and 10 in block 56, being subdivisions of parish lots 31 and 35, in the parish of St. Boniface, for the sum of \$525. He paid \$275 in cash, and gave a mortgage for \$250, the balance of the purchase money. The plaintiffs filed their bill asking to have the bargain rescinded, the money paid returned, and the mortgage cancelled, on the ground that the payment and mortgage were obtained by fraud and misrepresentations, and that such misrepresentations were untrue to the knowledge of the defendants.

The defendants answered separately, setting up the same grounds of defence; they denied the fraud and misrepresentations, and set up laches, and that the plaintiffs, by dealing with the lands, had debarred themselves from asking relief.

The evidence of misrepresentation and fraud was confined to the evidence given by the plaintiffs themselves. They said they purchased this land from the defendants through W. P. Robinson, one of the defendants, and that in the course of the bargain W. P. Robinson said that these lots were within half a mile of the Court-house in Winnipeg. Both the plaintiffs swore to this, and they proved that the real distance was at least one and a half miles. This distance of half a mile from the Court-house was spoken of elsewhere as that distance from the site of the present Court-house, and not from the one used at the time of the bargain. The plaintiffs gave evidence of that one misrepresentation only, and gave no evidence to

corroborate their oaths. The defendants, in their answers under oath, denied having made such representation. The plaintiffs also proved the payment of the money, and that they gave the mortgage and had offered to reconvey the land before suit.

It was proved that, at the time of the sale, the title stood in the name of the defendant F. W. Robinson. The bargain, however, was made with the defendant W. P. Robinson, and the mortgage for the balance of the purchase money was taken to and in the name of both defendants.

One of the plaintiffs saw the position of the lots upon a city map and measured the distance upon such map with a string. The lots were bought during a time of great excitement arising out of speculation in city lots which was at its height in February, 1882, and was over in May or June in the same year. This purchase was made in March of that year, and at a time when such property was affected by the excitement. The plaintiffs swore that they did not find out that the representation was untrue until August of that year. This was after the excitement had subsided. Mr. McPhillips, a land surveyor, said that the lots were now worth \$300, and that such property, within half a mile of the Court-house, would now be worth \$1,500, and at the time of this purchase would have been worth ten times as much; and that these lots would have sold readily. The price paid was that usually then paid.

The defendant W. P. Robinson was then sworn, and he unreservedly denied having made the statement that the lots were within half a mile of the site of the Court-house. He also said that the sale was made to the plaintiffs at the time of the land excitement above referred to; the land was considered as of very small moment; he was then engaged in buying and selling lands as a land agent. Similar lots were sold in the same neighbourhood at that price; he sold two close to them at \$550, and that lots adjoining them were now offered for city purposes at \$300; that in fact these lots have 50 feet frontage, and that he sold lots during the excitement only half the frontage at \$1,000 a lot, and he could have sold them at a profit to the plaintiffs if he had received them on sale for the plaintiffs. As an example of the fall in price he said that Hudson Bay lots have fallen 75 per cent. This was the whole evidence.

Robertson, for the plaintiffs.

Curran, for the defendants.

WALLBRIDGE, C.J., 29th January, 1884.—The law with respect to misrepresentation is laid down in *Barr v. Doan*, 45 U. C. R. 498, as follows:—"If a person make a false representation to another, knowing that it is false, with the intention of inducing that person to act thereon, and that person does act on it and is injured, he is entitled to recover." This I look upon as the correct state of the law.

The case now before me is that of an executed contract and differs from the case of a bill for specific performance. The Court, in the latter case, would refuse specific performance upon misrepresentation being proved,

but where the contract is executed, and its rescission is sought, the party complaining must go further and prove bad faith: *Wilde v. Gibson*, 1 H. L. C. 605. The case of *Foliffe v. Baker*, L. R. 11 Q. B. D. 255, declares that the difference between moral and legal fraud does not exist. The plaintiffs support their case by their own oaths, and offer no evidence in corroboration. The only defendant who knows or can swear to the bargain unequivocally denies the misrepresentation sworn to by the plaintiffs. If I examine the surrounding circumstances, the prices of lands in the neighbourhood of these at the time of the bargain, and also what similar lots would have been worth at the time of this sale and what they would now be worth, the probabilities are very greatly in favor of the defendants. The defendants were engaged in selling lands, and from the nature of their employment would have been very likely to have known the values. And the evidence of McPhillips, a land surveyor, supports the defendants' contention.

The weight of the testimony in my opinion is with the defendants.

I think the plaintiffs are bound to produce corroborative evidence of their statement, when the defendant W. P. Robinson pledges his oath against theirs: *Lyndsay v. Lynch*, 2 Sch. & L. 1; *Price v. Salsbury*, 32 Beav. 446; *Fry on Specific Performance*, sec. 607. These cases show that the plaintiffs are not entitled to recover on their own uncorroborated evidence.

Again, reviewing the whole evidence, where do I find bad faith, or the *malus animus* required by the case of *Foliffe v. Baker*, or where is the evidence that the plaintiffs acted upon the representation of which they now complain? One of the plaintiffs is a barrister, residing in the city, and did not complain of misrepresentation until the land excitement was over and the prices had fallen. Nor can I say that the purchase was made on the faith of the representation. I do not think the plaintiffs were in any way influenced by it; *National Exchange Co. v. Drew*, 2 McQueen 120.

In my opinion the bill should be dismissed with costs.

GLASS v. McDONALD.

Partnership—Dissolution—Accounts—Authority of one partner to make purchases for firm—Misconduct of one partner—Practice—Findings of Master—G. O. 213, construction of.

The defendant, being at the same time a partner of the plaintiff's, and a member of another firm, purchased from the latter firm, on behalf of the

plaintiff's firm, a quantity of lumber which was not needed and was never used.

Held, affirming the ruling of the Master in Equity, that the onus lay upon the defendant to show that the lumber was required for the plaintiff's firm, and not having done so, the price was properly disallowed to him in taking the partnership accounts.

The defendant bought in his own name, without consulting the plaintiff, an expensive machine, for the purposes of the partnership. It was never used for partnership purposes, and was never actually placed on the partnership premises. The partners never contributed a fixed sum to the partnership for capital, but from time to time made advances thereto. At this time the defendant applied to the cashier of the firm for a cheque for payment of the duty and freight on the machine. There being no partnership funds, the cashier gave the plaintiff's cheque, signed by him as attorney for the plaintiff, with which the defendant paid the duty and freight.

Held, affirming the ruling of the Master, that the price of the machine was properly disallowed to the defendant in the accounts, the circumstances under which the plaintiff's cheque was obtained being such as to preclude any inference of adoption and approval by the plaintiff.

The defendant, without taking any steps to ascertain the correctness of a claim for which the firm was sued, defended the action.

Held, affirming the Master's ruling, that the costs of that action were properly disallowed the defendant in the accounts.

Profits were made by the defendant on the sale of partnership effects; and as he had kept no accurate account of the sales, and it was impossible to ascertain the true amount due by him to the firm therefor, the Court refused to disturb the finding of the Master on this point, although the amount found due was alleged to be excessive.

The Master reported that certain sums mentioned in a schedule were sworn by the defendant, and denied by the plaintiff, to be the debts of the partnership.

Held, an improper finding.

Held, that, under G. O. 213, which is identical with G. O. 220 of Ontario, the Master had power under the usual directions in a Decree for taking partnership accounts, to adjudicate upon a claim by one partner for damages sustained by the misconduct of the other.

In this case the plaintiff filed his bill against the defendant for a dissolution of a partnership existing between them, and for the taking of the partnership accounts.

Thereupon a decree was made declaring the partnership dissolved, and directing an enquiry before the Master, and the taking of the usual accounts in a partnership suit.

Under this decree the Master made his report, and the defendant now appealed from it upon eight grounds, of which the following were the principal :—

1. That the Master should have allowed the items in the defendant's account relating to lumber supplied by McDonald and Grant to the partnership in question.

2. That the Master should have allowed the items charged in the defendant's account for the "Penfield" brick machine, bought by the defendant for the partnership.

3. That the Master should have allowed the item in the defendant's account numbered 91, being the account of one Brown for cordwood, and costs of a suit in respect thereof.

4. That the Master should have disallowed all the items of the plaintiff's own charges.

5. That the fifth clause of the report is not a proper finding, and that the sums mentioned in schedule D. of the report should be declared to be the debts of the partnership.

6. That there was no evidence to support the finding as to damages in the sixth paragraph of the report, and, if found by him at all, should have been found specially at the request of the plaintiff.

TAYLOR, J., 10th December, 1883.—The firm of McDonald and Grant was a firm in which the defendant was a partner; and the Master held that, the lumber referred to in the first ground of appeal having been supplied by them, the *onus* was on the defendant to show that the ordering of such a large quantity was necessary for the purposes of this partnership, or that there were reasonable grounds for supposing that it would be required. The defendant, in his judgment, failed to do this, and he therefore disallowed the items. Besides this lumber in question, a large quantity was got from Duluth, which was used, but that which was supplied by McDonald and Grant was not used. In my opinion, the Master was right in the conclusion he arrived at. In considering the propriety and reasonableness of the conduct of a partner in giving orders for supplies for partnership purposes, a much stricter rule should be applied in the case of supplies ordered from and given in the business in which he had an interest, than would be applied to the case of dealings with outside parties. In the present case, the parties were starting a brick yard—a new enterprise. The defendant himself seems to have had great doubts as to the quality of the clay, and its fitness for brick-making, yet he seems to have launched out into an extravagant outlay for plant from which no benefit whatever has been derived. That the quantity of lumber ordered was needed, or that there were any reasonable grounds for supposing that it would be needed, is supported only by the evidence of the defendant himself. In considering such evidence in a case like the present, where the defendant was really dealing with, and buying the lumber from, himself, the Master was, I think, correct. This ground of appeal is therefore disallowed.

The second ground of appeal refers to the "Penfield" brick machine, bought by the defendant for the partnership. This appears to have been a very costly machine, purchased by the defendant in his own name without consulting his co-partner. Two other machines had already been purchased, as to which the defendant did consult with him. The defendant's evidence as to the plaintiff's saying that he (the defendant) knew best what was necessary, and that he should get what was necessary, as it stands upon his depositions, shows, I think, that the remark of the plaintiff was made in connection with the purchase of the two "Martin" machines,

and not in connection with the purchase of the "Penfield" machine. The plaintiff objected to the purchase of this machine as soon as he heard of it. It was never used for partnership purposes, and, so far as I can gather from the evidence, was never *actually placed* in the brick yard of the partnership. That a cheque of the plaintiff's was given to pay for duty and freight on this machine cannot, I think, be taken as an adoption or recognition of the purchase by the plaintiff, when the manner in which the cheque came to be given is considered. The plaintiff's son held a power of attorney from his father which empowered him to sign his father's name to cheques drawn against his private account. He was also the cashier of the partnership, and so was empowered to draw and sign cheques for the firm. No sum was ever advanced by the partners to constitute the capital of the firm, but each paid out moneys from time to time as required. The defendant came to him for funds to pay the freight and duty. This request he, as the servant of the firm, was bound to comply with, if he had in his hands funds sufficient for the purpose. This he had not, and no doubt his regular and proper course, on an advance being made by his father to the firm, would have been for him to draw his father's cheque payable to the firm for the amount, and then to have given the cheque of the firm for the duty and freight. This he did not do, but handed to the defendant his father's cheque direct for this purpose. Under such circumstances, I do not think the giving of a cheque by the plaintiff's son can be taken as an adoption and approval by the plaintiff of this purchase. The second ground of appeal is also disallowed.

The third ground is that the Master should have allowed Brown's account for cordwood and the costs of the suit. The Master allowed the amount paid for the wood, but disallowed the costs of the suit, on the ground that no good reason for defending it was shown. The only reason assigned was, that the suit was brought for a larger quantity of wood than the books showed, but no enquiry or investigation as to the correctness of the claim seems to have been made before entering a defence. The plaintiff does not seem to have been consulted or informed of the suit, and defending the suit without any investigation into the correctness of the claim made was such a reckless proceeding that the Master was, I think, justified in disallowing the item of costs.

The fourth ground is that the Master should have disallowed all the items of the plaintiff's own charge.

On the argument of the appeal two items were discussed, the first being what was spoken of as the Monmouth wood; and the second, as the Selkirk wood. As to the Monmouth wood, it appears that the plaintiff objected to the quantity which had been cut, as being in excess of what would be required. The defendant said, "all right, it can be sold;" and to this the plaintiff agreed. The wood was cut for the partnership, and formed part of the stock of the partnership. There is no evidence that the plaintiff ever abandoned any interest which he had in it, or in any other way assented to the defendant's disposing of the surplus for his own use. Yet that is what he did. Any profit upon the sale must be accounted for to the partnership. It is contended that the Master has fixed an

altogether improper amount as that with which the defendant is chargeable. To ascertain the exact amount with which he should be charged, does not seem to be possible, but if the defendant is charged with too much it is entirely his own fault. He dealt improperly with this wood and kept no account of what it produced. The Master can only go by general evidence and a process of averaging. I cannot say from the evidence that he is wrong in the conclusion he arrived at. The Selkirk wood stands in the same position. The defendant had no right, when it was seized by the Indian Agent, to purchase it for himself. The partnership was not dissolved at that time, and he could only buy it in for the benefit of the firm. In the case of this wood too, the defendant kept no account, and it is the consequence of his own improper act if he is now charged with too much. A portion of this Selkirk wood was sold by the cashier of the firm, the defendant got the proceeds of that, and this was charged against him. It is said the amount charged against him is less per cord than charged against the defendant; but an account was kept of the exact amount which that produced, while the defendant sold part and kept no account at all.

The fifth ground of appeal is that the fifth clause of the report is not a proper finding and that the sums mentioned in schedule D. of the report should be declared to be the debts of the partnership.

The clause of the report objected to is in these words:—"I find that schedule D. hereto annexed, is a list of debts sworn by the defendant, but denied by the plaintiff, to be owing by the co-partnership to the persons therein named." There is no doubt that this is not a proper finding and there must be a reference back as to these alleged claims as to the partnership.

The sixth ground refers to the finding of the Master as to damages. The decree does not direct any enquiry as to damages. In Ontario, under Order No. 42, sec. 13 of 3rd June, 1853, it was held that the Master could, under the usual directions for taking partnership accounts, entertain and adjudicate upon a claim by one partner for damages sustained through the misconduct of the other: *Doupe v. Stewart*, 13 Gr. at p. 641. The G. O. 220 of Ontario is as wide as or wider in its terms than was Order 42, sec. 13 of the Orders of 3rd June, 1853. The G. O. 213 of this court is a copy of the Ontario Order 220, and I see no reason why the Master should not under that Order entertain and dispose of a claim for damages.

I am not, however, satisfied, that the evidence in this case is such as to warrant the Master in finding damages against the defendant, as he has done. Connected with this, is the first special finding of the Master, objected to in the seventh ground of appeal. I certainly could not find, upon the evidence, that the defendant represented himself as an experienced brick maker, and that there was upon his land clay suitable for the manufacture of bricks. He seems to have had, from the first, doubts as to the clay being suitable for that purpose, although he certainly went on making arrangements for the manufacture of bricks upon a scale wholly unwarranted by the opinion he entertained of the character and quality of the clay. How the amount of the damages was arrived at does not appear, but it

would seem as if the Master had allowed the plaintiff, by way of damages, the whole amount which he put into the partnership, with interest, after charging against him the proceeds of the wood sold which he received. Certainly, if he receives that and also his half of the balance found against the defendant, and one half the proceeds of the outstanding estate, instead of sustaining damage from the partnership it will prove rather a profitable one to him. The report should be referred back to the Master for review as to his finding in regard to damages, and his special findings at the close of the report. As the defendant, the appellant, fails in part and succeeds in part, perhaps the best mode of disposing of the question of costs will be to allow no costs to either party.

Glass, Q.C., in person, and *Ewart*, for the plaintiff.

Howell and Hough, for the defendant.

THE CANADIAN LAW TIMES.

OCCASIONAL NOTES.

Supreme Court of Canada.

ONTARIO.]

THE BOTHWELL ELECTION CASE.

HAWKINS v. SMITH.

Ballots—Scrutiny—Irregularities by Deputy Returning Officers—Numbering and initialling ballot papers—Effect of—The Dominion Elections Act, 1874, sec. 80.

In a polling division there was no statement of votes either signed or unsigned in the ballot box, and the deputy returning officer had endorsed on each ballot paper the number of the voter on the voters' list. These votes were not included either in the count before the returning officer, the re-summing up of the votes by the learned Judge of the County Court, nor in the recount before the Judge who tried the election petition.

Held (affirming the decision of the Court below), that these ballots were properly rejected.

Certain ballot papers were objected to as having been imperfectly marked with a cross, or with more than one cross, or with an inverted V, or because the cross was not directly opposite the name of the candidate, there being only two names on the ballot paper, and a line dividing the paper in the middle.

Held (affirming the ruling of the learned judge at the trial), that these ballots were valid.

Per Ritchie, C.J. Whenever the mark evidences an attempt or intention to make a cross, though the cross may be in some respects imperfect, it should be counted, unless, from the peculiarity of the mark made, it can be reasonably inferred that there was not an honest design simply to make a cross, but that there was also an intention so to mark the paper that it could be identified, in which case the ballot should be rejected. But if the mark made indicates no design of complying with the law, but on

the contrary a clear intent not to mark with a cross as the law directs, as for instance by making a straight line or a circle, then such non-compliance with the law renders the ballot null.

In Division I., Sombra, during the progress of the voting, at the request of one of the agents, who thought the ballot papers were not being properly marked, the deputy returning officer initialled and numbered about twelve of the ballot papers, but finding he was wrong, at the close of the poll, he, in good faith and with an anxious desire to do his duty, and in such a way as not to allow any person to see the front of the ballot paper, and with the assent of the agents of both parties, took the ballots out of the box and obliterated the marks he had put upon them.

Held, Gwynne, J., dissenting, that the irregularities complained of not having infringed upon the secrecy of the ballot, and the ballots being unquestionably those given by the deputy returning officer to the voters, they should be held good, and that said irregularities came within the provisions of sec. 80 of the Dominion Elections Act, 1874; *Jenkins v. Brecken*, 3 C. L. T. 23, 253, *sub nom. Queen's County Election case*, followed.

Per Henry, J. On the trial of an election petition ballots numbered by the deputy returning officer, as in the present case, should be held bad; but it did not lie in the mouth of the present appellant, who had acted upon the return of the returning officer and taken his seat, to claim that the proceedings were irregular and say that the election was void.

Hector Cameron, Q.C., for the appellant.

Lash, Q.C., for the respondents.

ONTARIO.

Supreme Court of Judicature.

COURT OF APPEAL.

Q. B.]

PATTERSON v. THOMPSON.

Distress for rent—Replevin—Joint ownership of goods distrained—Exemption of goods on premises for trade purposes.

The judgment of the Court below, 46 U. C. R. 7; 1 C. L. T. 207, was reversed, Spragge, C.J.O., dissenting, on the ground that the plaintiff had not established the right to sole possession of the logs.

Per Spragge, C.J.O. If there was joint ownership in the plaintiff and one of the tenants, the logs were not distrainable for rent if they were on the demised premises for a purpose which exempted them from distress. There should be a reference back to the learned Judge who tried the case to find absolutely as to the property in the logs. If that could not be done, there should be a new trial.

McCarthy, Q.C., for the appellant.

Lount, Q.C., for the respondent.

High Court of Justice.

QUEEN'S BENCH DIVISION.

[ROSE, J., 26TH FEBRUARY, 1884.]

In re HARDING & WREN.

Arbitration and award—Costs—Severability.

Where the submission or order of reference is silent as to costs, arbitrators have no power to adjudicate upon them, but each party must bear his own costs and half those of the award.

A direction as to the costs in such a case,
Held, severable from the rest of the award.

E. Sydney Smith, for the award.

Holman, contra.

REGINA v. BERNARD.

Conviction—Prior conviction—Refusal to receive evidence of—Costs.

A warrant was issued by a Magistrate for the apprehension of the defendant who was brought before another Magistrate thereon, convicted and fined. Subsequently the Magistrate who had issued the warrant caused the defendant to be summoned before him for the same offence, and again convicted and fined him, after refusing to receive evidence of the prior conviction.

The Court quashed the second conviction with costs.

Held, that, even assuming that the first conviction was void by reason of the defendant having been brought before a Magistrate other than the one who issued the warrant, his appearance and pleading thereto amounted to a waiver, and at any rate the Magistrate who convicted the second time could not take advantage thereof.

G. H. Watson, for the defendant.

A. Cassels, contra.

COMMON PLEAS DIVISION.

COSGRAVE BREWING CO. v. STAIRS.

Guarantee to firm—Death of partner—Notice determining guarantee.

By an agreement under seal, made between C. & Co., a firm of brewers, consisting of C. and his two sons, of the first part, Q. of the second part, and defendant of the third part, defendant agreed to become responsible in a continuing guarantee of \$5,000 to C. & Co., or its members for the time being constituting the firm of C. & Co., for beer to be supplied to Q. so long as C. & Co. desired to sell and Q. to purchase same. On 6th

September, 1881, C. died, Q.'s liability then being \$5,248. By C.'s will he appointed his said two sons his executors. They continued to carry on the business, and shortly afterwards entered into partnership under the same name, C. & Co. On 2nd October, 1882, the assets of the then firm were conveyed to one D. in trust for a Joint Stock Company to be formed, and on its incorporation on 13th December following, the assets were conveyed to the Company, the present plaintiffs. Q. continued to be supplied with goods, and on 1st June, 1883, when this action was commenced, the indebtedness was over \$5,000; but since C.'s death, more than \$5,248, the then liability, had been paid by Q. In an action against defendant under the agreement to recover the \$5,000, the amount of his guarantee,

Held, that by the death of C., a change in the firm was constituted and the defendant was thereby relieved from any further liability under the agreement; and the evidence showed that the amount of the indebtedness at C.'s death had been paid.

On 1st April, in consequence of Q. falling into irregular habits, defendant notified the then firm not to supply Q. with any more goods. The evidence showed that the firm was aware that Q.'s business was not in a satisfactory state.

Semble, that this would have put an end to defendant's liability, if not before put an end to.

Osler, Q.C., and E. H. E. Eddis, for the plaintiffs.

Aylesworth, for the defendants.

COUGHLIN v. HOLLINGSWORTH.

Claim—Counterclaim—Balance in favour of defendant—Costs.

An action on an unsettled account, to which there was a counterclaim also on an unsettled account, was referred. The referee found that there was a sum of \$148.81 due the plaintiff on his claim; and \$164.50 due the defendant on his counterclaim, leaving a balance due defendant of \$15.69; and he certified to entitle the defendant to full costs. It appeared that the Statute of Limitations was pleaded respectively to the claim and counterclaim, and the items barred by the statute were in consequence disallowed; but that, apart from the statute, the balance would have been in the plaintiff's favour. On motion to enter judgment the only question was as to the distribution of the costs.

Held, that the plaintiff was entitled to recover the costs of and relating to his claim and proof thereof, including the reference and subsequent proceedings; and that the defendant was entitled to recover the sum of \$15.69, with the costs of and relating to his counterclaim and the proof thereof, including the reference and subsequent proceedings; the Taxing Officer to decide as to items in common; and that judgment should be entered for the party in whose favour the balance should be found.

G. H. Watson, for the plaintiff.

French, for the defendant.

CHANCERY DIVISION.

[BOYD, C. AND FERGUSON, J., 21ST FEBRUARY, 1884.

BEATTY v. O'CONNOR.

Mortgage—Short form—Power of sale—Selling on credit—Costs of actions and proceedings under power.

Where a mortgagee, acting under the power of sale in a mortgage made in pursuance of the Act respecting Short Forms of Mortgages, sells upon credit, taking a mortgage for the unpaid balance of the purchase money, he must treat the mortgage as cash and cannot charge the mortgagor with the expense of turning it into cash.

The mortgagee obtained judgment on the covenant and in ejectment and taxed his costs in these actions besides taking proceedings for sale under his power.

Held, that G. O. 465 did not apply as there had been no proceedings in equity, and that he was entitled by the judgments to the costs of obtaining them, and to the costs of sale by virtue of the contract therefor in his mortgage which made them a first charge on the proceeds of sale.

Lennox, for the plaintiff.

G. W. Lount, for the defendant.

[OSLER, J.A., AND FERGUSON, J.

SORENSEN v. SMART.

Judgment—Estoppel.

This defendant sued this plaintiff on the common counts and the latter pleaded payment. This defendant recovered judgment for \$920. Afterwards this plaintiff, alleging that he had not received credit for a payment of \$300 which he believed had been made but which he had by inadvertence omitted to give evidence of in the action, brought this action to recover the same.

Held, that he was estopped by the judgment in the former action, for to allege that the judgment for \$920 should have been for \$620 only would be to directly contradict the record.

IN CHAMBERS.

[BOYD, C., 4TH FEBRUARY, 1884.

MILES v. ROE.

Dominion Elections Act, 1874—Bribery—Action for penalties—Wilful delay—Dismissal of action.

In an action to recover penalties for bribery at an election under 37 Vict. cap. 9 (D), the writ was issued on 12th June, 1883, the acts complained of having taken place in June, 1882. The writ was served on 27th November, 1883.

Held, reversing the decision of the Master in Chambers, that the action should be dismissed for wilful delay in prosecution thereof under section 119 of the Act; and that such a delay as would not expose an ordinary action to dismissal might be fatal under this Act.

The plaintiff's solicitor swore that the delay was occasioned by the proceedings in an election petition complaining of the election at which the acts in question herein took place.

Held, that this was no excuse for the wilful delay.

W. H. P. Clement, for the appeal.

Bethune, Q.C., and *Aylesworth*, contra.

In re DUMBILL.

Lunacy petition—Costs.

A petition was presented by the husband of D. to declare her a lunatic, and was opposed by D. Pending the hearing of the petition D. assigned her separate estate for the benefit of her creditors. The Court dismissed the petition.

Upon an application by D.'s solicitor for an order for payment of his costs between solicitor and client by the assignee in priority to creditors' claims,

Held, that the costs were necessities which the wife was liable to pay out of her separate estate, and for which that estate was liable in the hands of her assignee.

Held, that the rule that provision should be made for maintenance out of the insolvent estate of a lunatic did not apply to these costs, because the estate was not being administered in lunacy, and because the costs could not be put on the footing of maintenance. The costs should be paid rateably out of the assets, and costs subsequent to the assignment should not rank in competition with creditors before the assignment.

Lefroy, for the motion.

Shepley, contra.

RYAN v. FISH et al.

Action for Dower—Striking out pleadings—Jurisdiction of Master in Chambers—Judicature Act, secs. 47 and 48.

In an action for damages for detention of dower, the defendants pleaded, (i) that the lands in question were wild lands and the plaintiff was not entitled to the sum claimed for damages if any; (ii) that the plaintiff had assigned her claim for damages; (iii) set-off for moneys expended in respect of the lands; (iv) that they did not detain, but were always willing, etc.

On a motion in Chambers, after issue joined, for an order directing a reference as to the damages under section 47 of the Judicature Act, and upon evidence both for and against the truth of the pleas, the Master made an order striking out the second and third paragraphs and directing a reference.

Held, that he had no jurisdiction to make an order, and that the issues raised questions that were properly triable only at the hearing.

Lash, Q.C., and *King*, for the plaintiff.

Hoyles and Macnee, contra.

MASTER'S OFFICE.

[THE MASTER IN ORDINARY, 8TH JANUARY, 1884.]

*In re MUNSIE.**Administration order—Validity of will—Issue—Jurisdiction of Master.*

The plaintiffs, when taking accounts before the Master under the ordinary Chamber order for the administration of personal estate, sought to have it declared that a bequest to R., who was one of the witnesses to the will, was invalid.

Held, (i) That the Master had no jurisdiction under such order, and on oral pleadings, to adjudicate upon the validity of the will; (ii) that even if there was such jurisdiction, it could not be exercised in the absence of a personal representative of R.'s estate.

Quare, whether, since *Ryan v. Devereux*, 26 U. C. R. 100, such a bequest would be held to be invalid.

TAXING OFFICE.

GAGE v. CAMPBELL.

Costs—Discontinuance—Rules 170, 172, 442.

Immediately on receipt of notice of discontinuance the defendant entered judgment for costs to be taxed, following Form 164, O. J. A.

On taxation the costs of entering judgment were objected to.

R. S. Cassels, for the plaintiff.

Middleton, for the defendant.

Mr. Clark, Taxing Officer, ruled that, although the defendant under the strict interpretation of the rules was entitled to enter judgment for costs to be taxed, immediately on receipt of notice of discontinuance, yet that the proper practice was to tax the costs first, and then enter judgment if they were not paid; and exercising his powers under Rule 442 he disallowed the costs of entering judgment.

H. C.

MANITOBA

In the Queen's Bench.

[HILARY TERM, 1884.]

CASTON v. SCOTT.

Foreign plaintiff—Security for costs—Plaintiff owning real estate in Province.

The fact that a plaintiff owns real estate within the Province is no answer to an application for security for costs.

Appeal from an order of Dubuc, J., refusing an application made by the defendant for security for costs, the plaintiff residing in Ontario out of the jurisdiction of the Court, but having incumbered real estate within the Province.

Killam, for the appeal.

McArthur, contra.

The judgment of the Court was delivered by

TAYLOR, J.—Two questions are raised before us: 1st, whether a plaintiff resident out of the jurisdiction of this Court, but possessed of real estate within the jurisdiction, can be required to give security for costs; and 2nd, whether, if the possession of such real estate is an answer to such an application, the property must not be unincumbered.

In Ontario, the possession of real estate within the jurisdiction has for a long time been held to relieve the plaintiff from the necessity of giving security: *White v. White*, 1 Chy. Cham. 48, and subsequent cases. It has, however, been held that it must be unincumbered property: *Gault v. Spéncer*, 3 U. C. L. J. N. S. 70; *Ganson v. Finch*, 3 Chy. Cham. 296.

In England, on the question whether the possession of money, Exchequer Bonds, or other floating capital is not an answer to the application, Mr. Archbold says (Arch. Pr. 12th Ed. p. 1415) it would be so, if the plaintiff "be in possession of chattels real or other property of a fixed and permanent nature and available to process by the defendant."

From *Swinburn v. Carter*, 23 L. J. Q. B. 16, I should infer that in England also it must be unincumbered property.

For the plaintiff it was said that, even if under mortgage, the possession of real property should in this Province be a sufficient answer to the application, because such property is available to process, since the equity of redemption can be reached by an execution. That, however, is scarcely the test. In England, ever since the 1 & 2 Vict. cap. 110, under which Exchequer Bills and Stock could be reached and charged by process, the possession of such property has not been held sufficient: *Edinburgh and Leith Ry. Co. v. Dawson*, 7 Dowl. 576. Such property was said in that case not to be sufficient security because "it may be passed so easily from one person to another."

In this Province lands do as a matter of fact pass from one person to another almost as easily as personal property, and therefore, in my opinion, the mere possession of real estate should not be accepted as a sufficient answer to an application for security.

A party may not have any one in the Province whom he could ask to give security on his behalf by bond, but he can always answer the application by paying money into Court; and it would not be reasonable to say that where the plaintiff owns real property a mortgage given to an officer of the Court conditioned to be void upon payment of a certain sum should costs be awarded against him should be accepted.

The present application should be allowed, and an order for security given; but as the point is a new one, and raised for the purpose of settling the question, the application should be allowed without costs.

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SEAMEN'S WAGES—MARITIME LAW.

SOME diversity of opinion has existed, and in many quarters still continues, as readers of the *CANADIAN LAW TIMES* are aware, regarding the *status* before the law of persons having claims for seamen's wages. To define this, or to ascertain as nearly as may be the rights and remedies to which seamen are now entitled in this Province for wages earned on board ship, is the object of the present article.

It is indispensable to an accurate understanding of the subject that reference should be made to the law governing the British Admiralty and Vice-Admiralty Courts, as that from which our own is derived; and it will be convenient to do this before stating the law contained in our own statutes and decided cases.

First, it is to be observed as a general principle, acted upon by Courts of Admiralty, that seamen are favourites of the law, and placed particularly under its protection. Those Courts are anxious to protect them against circumvention, and even misapprehension and error (a). "Seamen are a class of men," says Lord Stowell, "on all accounts requiring protection against themselves."

Mr. Justice Hill of the Supreme Court of Nova Scotia, (the other judges concurring), justifying the principle re-

(a) *The Hoghton*, 3 Hagg. 112; *The Minerva*, 1 Hagg. 358; *The Elisabeth*, 2 Dods. 407; *The Jupiter*, 2 Hagg. 221; *The Madonna D'Ibra*, 1 Dods. 39; *The Julianna*, *Ibid.* 463.

ferred to, says, "In upholding and protecting the interests of seamen, we best subserve the interest of the mercantile world who employ them (b)." The earliest maritime codes that have come down to us appear to recognize the same principle. "The Laws of Oleron," observed Mr. Justice Grose, in *Cutten v. Powell* (c), were "extremely favourable to seamen."

Some attribute the first Sea Laws to the Phœnicians and Carthagenians, but the better opinion would seem to be that the beginning of such laws was with the people of Rhodes, who had by their commerce and naval victories obtained the sovereignty of the Mediterranean about nine hundred years before the Christian era, and whose laws were for a thousand years the governing Sea Laws of the then known world, observed and followed by both Greece and Rome (d).

But modern maritime law is not traced from a more remote source than the Decisions of the Consuls of the Sea of the City of Trani on the shores of the Adriatic, A.D. 1068, being a series of decisions made after deliberation by the Consuls of the Corporation of Navigators at Trani (e).

The cardinal point of distinction, observes the learned editor of the Black Book of the Admiralty, between the ancient and modern systems of Maritime Law is that the mariner under the modern system is a free man. The slave no longer figures as a chattel which may be thrown overboard to lighten the ship. Accordingly we find him treated as a free man from this period, the Decisions of Trani containing provisions as to his rights and obligations.

It is laid down among other things in those Decisions that for certain faults only the mariner might be discharged from the ship, and that a mariner could only quit the service of the ship during her voyage under certain circumstances, and on forfeiting half his wages. And all the

(b) *Ralston v. Barss, et al.*, Thomson's Rep. 48.

(c) 6 T. R. 320.

(d) *Lex Mercatoria*, 87; *Black Bk. Admiralty*, Vol. IV. p. 12; *Benedict's Ad. s.* 179.

(e) *Black Bk. Admiralty*, Vol. IV. p. 43.

maritime codes of mediæval times contain provisions regarding the hiring of seamen, their duties, wages, etc., as may be seen by reference to those codes, viz. the Maritime Laws of Wisburg, the judgments of Oleron, compiled by Richard I. in the Island of Oleron; and the Customs of the Sea, collected and digested in the Book of the Consulate of the Sea of Barcelona; forming, in conjunction, a continuous chain of Maritime Law extending from the easternmost ports of the Baltic, through the North Sea and along the coast of the Atlantic to the Straits of Gibraltar, and thence to the furthest eastern shores of the Mediterranean (*f*). Such provisions are also contained in the Amalphitan Table, the Dantzic Ship Laws, the Sea Laws of Flanders, the Judicial Orders of the Courts of the Consuls of the Sea (Valencia), the Maritime Assizes of the Kingdom of Jerusalem by Godfrey of Bouillon after the first crusade, A.D. 1099, and more particularly the Good Customs of the Sea (English) embracing the Laws of Oleron, and contained in the Black Book of the Admiralty kept in the Registry of that Court for the use of the Judges of the Admiralty successively, a book of great authority, and dating back to the reign of Edward I. (*g*). In the last named code the wages to be paid mariners on various voyages were itemized and the rate fixed, *e. g.*, "Between London and Skone a mariner shall have eight shillings and four pence wages, and three mariners the carriage of a last of herrings (*h*).

Many of these Good Customs of the Sea eventually became incorporated in the English statute law, and others have received the impress of judicial authority in the judgments of the Courts, more especially of the High Court of Admiralty, and now form part of the established Law administered by that Court and the Vice-Admiralty Courts.

The Admiralty jurisdiction over suits for the recovery of

(*f*) Black Bk. Admiralty, Vol. IV. p. 27. See also Peter's Admiralty Rep. U. S. xliii for Laws of Oleron, Wisburg and The Hanse Towns.

(*g*) *Ib.* Vol. I. Intro.

(*h*) *Ib.* Vol. I. p. 141.

seamen's wages is partly original and partly given by statute (*i*).

The first instance of any regulation in England requiring an agreement in writing with the seaman is a by-law of the Trinity House (approved by Chancellor Jeffries) made in 1687, ordering every commander of a ship hiring any mariner or seaman to sail with him on any voyage to sea, to take in writing under the said seaman's hand, upon what condition he is entertained, and that he doth submit himself to the by-laws of Trinity House (*j*).

One of the earliest of these statutes, and one looking to the protection and government of seamen and at the same time to the "welfare and riches of the kingdom," was passed in 1729, being "An Act for the better regulation and government of seamen in the merchant service" (*k*); which provided for an agreement being entered into with the crew of a ship, but also enacted that "no seaman or mariner by entering into or signing such contract or agreement as aforesaid shall be deprived of or hindered from using any means or methods for the recovery of wages against any ship, the master or owners thereof, which he may now fully make use of; and in all cases where it shall or may be necessary that the contract or agreement in writing aforesaid should be produced in Court, no obligation shall lie on any seaman or mariner to produce the same, but on the master, owner or owners of the ship for which the wages shall be demanded, and no seaman or mariner shall fail in any suit or action or process for recovery of wages for want of such agreement or contract being produced." This statute was made perpetual by 2 Geo. III. cap. 81, by which also it was extended to His Majesty's Colonies in America. (Canada, however, it is to be observed, was at that time not one of His Majesty's Colonies).

Returning now to the question first proposed, it should

(*i*) Smith's Summary, p. 48; Wms. & Bruce, 168.

(*j*) Maude & Pollock, M. S., 4th Ed. Vol. I. p. 195.

(*k*) 2 Geo. II. cap. 36.

be mentioned that the Statutes of Canada affecting the question are the following :

- (a) 36 Vict. cap. 129, The Seamen's Act, 1873.
- (b) 38 Vict. cap. 29, The Seamen's Act, 1873, extension.
- (c) 40 Vict. cap. 21, The Maritime Court Jurisdiction Act, 1877.
- (d) 42 Vict. cap. 40, An Act to amend the Maritime Court Jurisdiction Act, 1877.
- (e) 45 Vict. cap. 34, An Act to amend 42 Vict. cap. 40.

And in connection with these are to be read certain sections of the Vice-Admiralty Courts Act, 1863, (Imp.).

Ship.—Within the meaning of these statutes, "ship" includes "every description of vessel used in navigation not propelled by oars." This definition agrees with that in the Vice-Admiralty Courts Act, 1863, but in the latter the words, "whether British or foreign," are added.

It has been held by the Maritime Court of this Province that a steam dredge is not a ship within the above mentioned definition (*l*).

Seaman.—This word includes every person (except masters, pilots, and apprentices duly indentured) employed or engaged in any capacity on board any ship (*m*). But the definition in the Act 45 Vict. does not make the exception of masters, pilots and apprentices.

Besides ordinary seamen, persons serving on board ship in the following capacities have been held entitled to sue as seamen for wages:—A ship's surgeon; a purser; a boatswain; a female cook, and steward; a carpenter (*n*); also the engineer and fireman of a steamship.

Lien.—A maritime lien is a right to enforce certain claims against the *res*, or thing itself, whether it be ship, cargo, or freight. As soon as the act has been done which causes the claim to arise and attach itself to the *res*, such

(*l*) *The Nithsdale*, 15 C. L. J. N. S. 268.

(*m*) The Seamen's Act, 1873, 1875.

(*n*) Roscoe's Admiralty Prac. 39.

claim is enforceable against such *res*, into whatever possession it may pass (o).

The lien continues until the party has reasonable opportunity of enforcing it (p), subject of course to statutory limitations afterwards alluded to.

Seamen's wages constitute such liens. "These are sacred liens," said Lord Stowell (q), "and as long as a plank remains the sailor is entitled against all other persons" (i. e., claiming at that time, and in that particular case, which was on a bottomry bond), "to the proceeds as a security for his wages. This is a principle universally admitted."

The lien on the ship for wages is one recognized in the Maritime Law of Europe from the earliest times (r).

Holt, C. J., in 1698, refused a prohibition to the Admiralty for wages on a contract made on land, observing, "The reason why the King's Bench permits mariners to sue in Admiralty for wages is because by the Maritime Law mariners have security in the ship for their wages; therefore the King's Bench allows mariners to sue in the Admiralty for their wages," and it is a sort of implied hypothecation to them (s).

The ship is the primary security for the mariner (t). And if the ship is wholly lost, but insured, the sailor can claim his wages out of the insurance money (u).

Agreement or Shipping Articles.—Various statutes since the Act of Geo. II. above mentioned have been passed regarding the agreement or shipping articles; but the question is now governed by the Seamen's Act, 1873 and the Seamen's Agreement Act, 1875, which provide for an agreement being entered into between the master and the crew of certain vessels; the latter Act affects vessels

(o) Abbott M. S. Laws, 12th Ed. p. 601.

(p) *The Admiral*, 18 L. R. 91; *The Rebecca*, Ware, 188.

(q) *The Madonna D'Idra*, 1 Dods. 40.

(r) MacLachlan's Shipping, 2nd Ed., 235.

(s) *Hook v. Morton*, 1 Ld. Raym. 398.

(t) *The Golubchick*, 1 W. Rob. 143.

(u) *In re Dawson*, 17 L. T. 100 (Bankruptcy).

registered in Canada, propelled by steam, and of more than twenty tons registered tonnage ; or if sailing vessels, fifty tons, employed in navigating the inland waters of Canada above the harbour of Quebec. The agreements are to contain, among other particulars, the amount of wages which each seaman is to receive.

Upon the Statute of 2 Geo. II., above cited, Lord Ellenborough, C. J., held that it introduced an exception to the general rule, and required the captain without notice to produce the articles at the trial if he would found any objection upon them or resort to them for any purpose whatever in making his defence (*v*). And so the law stands in England at the present time. Mr. Taylor in his work on Evidence (*w*), citing the Merchant Shipping Act, sec. 165, says, "The Legislature has interfered on behalf of merchant seamen, whose proverbial inexperience and recklessness have rendered them fit objects for special statutory protection, and has enacted that 'every seaman may bring forward evidence to prove the contents of the agreement with the master of the ship, or otherwise, to support his case, without producing or giving notice to produce the agreement itself or any copy of it.'" Precisely the same clause is contained in the Canadian Acts above referred to (*x*).

Indeed we find it stated that although the agreement is not in writing, or not in the authorized form, it seems, nevertheless, to be binding, and provable in favour of the seaman, but inadmissible in evidence for the owner or the master against him (*y*) ; and such has been the rule in the Maritime Court of this Province (*z*).

In further pursuance of the policy of the law to protect seamen against their own improvidence and against imposition by others is the provision of the Seamen's Act, 1878,

(*v*) *Bowman v. Manzelman*, 2 Camp. 315.

(*w*) Taylor on Ev. 7th Ed. 408.

(*x*) The Seamen's Act, 1873, sec. 35 ; The Seamen's Act, 1875, sec. 8.

(*y*) MacLachlan's Law of Merchant Shipping, 2nd Ed. p. 202 ; Maude & Pollock, 4th Ed. p. 196, note (e) ; and see *The Tug Robb*, 17 C. L. J. 67.

(*z*) *The Tug Robb* (supra).

sec. 45, that no seaman shall by any agreement forfeit his lien upon the ship, or be deprived of any remedy for the recovery of his wages to which he would otherwise have been entitled; and of section 80 that his wages shall not be subject to attachment or arrestment from any court, or to assignment or sale prior to the accruing thereof. The law is the same in the United States (a).

Remedy for Recovery of Seamen's Wages.—Until the Maritime Jurisdiction Act, 1877, and the establishment of the Maritime Court of Ontario, the seaman had no remedy in this Province except by a personal action against the master or owner for his wages. Even in the case of a vessel arriving in a port in this Province from an ocean voyage, during which the lien of the seaman for wages had attached by virtue of the general maritime law above referred to, there was no Court here which could take cognizance of that lien and enforce it as a lien. But by the Act referred to all persons now have in this Province the like rights and remedies in all matters (including cases of contract and tort, and proceedings *in rem* and *in personam*) arising out of or connected with navigation, shipping, trade or commerce on any river, lake, canal or inland water of which the whole or part is in the Province of Ontario as such person would have in any existing British Vice-Admiralty Court, if the process of such Court extended to this Province. And for the enforcement of such rights and remedies the Legislature has conferred upon the Maritime Court all such jurisdiction as belongs, in similar matters, within the reach of its process, to any existing British Vice-Admiralty Court.

The rights and remedies which seamen had in Vice-Admiralty Courts existing at the time of the passing of the Act referred to, and the powers of those Courts to enforce them, corresponded with those in the High Court of Admiralty in England; and by the decisions of that Court as well as by the decisions of the Vice-Admiralty Courts the Maritime Court of this Province is guided, subject of course to Imperial or Dominion legislation.

(a) *The John E. Holbrook*, 7 Benedict 356.

In the enumeration of claims over which jurisdiction is conferred upon Vice-Admiralty Courts by 26 and 27 Vict. cap. 24 (Imp.), called the "*Vice-Admiralty Courts Act, 1863*," we find *claims for seamen's wages*, as item (1) of the 10th section of that Act; and those Courts are to have that jurisdiction, whether the cause or right of action has arisen within or beyond the limits of such possession (sec. 18), i.e., British possession.

Attention should here be directed to the statutory interpretation of the term, "British Possession." By the interpretation clause of the Vice-Admiralty Courts Act, and for the purposes of the Act (if not inconsistent with the context or subject matter), the following meaning is placed on the term, "British Possession," viz.:—"Any colony, plantation, settlement, island, or territory, being a part of Her Majesty's Dominions, but not being within the limits of the United Kingdom of Great Britain and Ireland, or of Her Majesty's Possessions in India." But "The Merchant Shipping (Colonial) Act, 1869," 32 Vict. cap. 11, sec. 7 enacts that in the construction of "The Merchant Shipping Act, 1854," and of the Acts amending the same, Canada shall be deemed to be one British Possession. And those parts of the Merchant Shipping Act relating to seamen's wages which have been extended to the inland waters would no doubt be construed with reference to this interpretation. Within the meaning of the Vice-Admiralty Courts Act, however, it would appear that Canada is not one British Possession so as to enable a Vice-Admiralty Court in one Province to exercise jurisdiction over a vessel registered in another, in a suit between part owners of a ship (b).

Had the seaman's rights and remedies stood upon this Act, and the sections of our Act of 1877, above cited, they would have been upon an equal footing with those of seamen in the Admiralty and Vice-Admiralty Courts. But sub-section 4 of section 2 of the last named Act makes a delay of ninety days in taking proceedings for enforcement of their rights or remedies *in rem* sufficient to post-

(b) *The Edward Barrow*, 6 Que. L. R. 94 (1880).

pone their claims to those of subsequent *bona fide* purchasers or mortgagees of a ship; so that in this Province such a delay might be fatal to the claim.

A further curtailment of the rights which seamen would have had by the extension in its integrity, of the Vice-Admiralty jurisdiction to the inland waters, was effected by a subsequent Act, viz., 42 Vict. cap. 40, whereby it was enacted that no right or remedy *in rem* given by The Maritime Jurisdiction Act, 1877, should be enforced as against any *bona fide* mortgagee under a mortgage duly executed and registered prior to the 1st October, 1878. But this provision has since been so far repealed by 45 Vict. cap. 34 as to prevent such mortgagee from cutting out any claims for wages accruing after its passage, viz. the 17th August, 1882.

It is necessary, therefore, prior to instituting a suit in the Maritime Court for seamen's wages, to ascertain (1) if ninety days have elapsed since the cause of action arose, whether there has been any subsequent *bona fide* sale or mortgage of the vessel, and whether the mortgage is of such amount as would leave no surplus of proceeds in case of sale of the vessel, out of which the wages could be satisfied; (2) as to wages accrued before 42 Vict. cap. 34, whether there is any mortgage on the vessel executed and registered prior to 1st October, 1878, and still subsisting. In these respects our law differs from the English Admiralty and Vice-Admiralty law, which gives to wages priority over mortgage debts (c) and makes the lien enforceable into whosoever hands the *res* may go (d).

With the qualifications mentioned, the lien of the seaman upon the ship for wages is recognized and enforced by the Maritime Court of Ontario. The reported judgments of that Court are, as yet, not numerous; but in referring to those relating to seamen's wages it may be mentioned

(c) Roscoe's Ad. Pr. 62.

(d) *The Two Ellens*, L. R. 4 P. C. 169; *The Bold Buccleugh*, 7 Moo. P. C. 284.

that it has been held that the jurisdiction of the Court is not retrospective, and that it could not entertain a claim for wages that had accrued before the Maritime Jurisdiction Act came into force (e).

It has been held, also, by the late learned Judge of the Maritime Court, dissenting from the case of the *Margaretha Stevenson* (f), that the Court's jurisdiction is not restricted by the 189th section of the Merchant Shipping Act, with which section 56 of the *Seamen's Act, 1873* (Canada), corresponds, to suits where the sum sued for is fifty pounds or upwards, there being no such restriction in the Vice-Admiralty Courts Act itself (g). And indeed in the High Court of Admiralty that restriction appears to have been removed by the Admiralty Court Act, 1861, sec. 10, under which the question is resolved into a question simply of costs, there being a proviso in that section to the effect that if the plaintiff do not recover fifty pounds he shall not be entitled to any costs unless the judge shall certify that the cause was a fit one to be tried in the said Court.

In the Vice-Admiralty Court of Quebec, however, as recently as July, 1888, in a suit for seamen's wages, the case of the *Margaretha Stevenson* was cited with approval and followed, the learned Judge remarking, "As respects British vessels and seamen, the section of the statute limiting the jurisdiction to £50 has been continually acted on by this Court since the decision in the case above referred to (*The Margaretha Stevenson*)," and the learned judge then held that the section mentioned was also applicable to foreign vessels (h). But according to the decision in *The Tug Robb* (supra) the judgment of a Vice-Admiralty Court, although entitled to every respect, is not binding on the Maritime Court of Ontario, and the decision in that case will probably continue to govern the question until a different judgment

(e) *The Tug Kate Moffatt*, 15 C. L. J. 284.

(f) 2 Stu. 192.

(g) *In re Tug Robb*, 17 C. L. J. 66; *The Red Bird*, 3 C. L. T. 455; *The Tug Maytham*, 18 C. L. J. 285.

(h) *The Monark*, 9 Que. L. R. 214.

shall be pronounced by the Supreme Court, especially as the additional Rules of Court cited by the learned Judge in that case, made in November, 1879, acknowledge to all intents and purposes that the Maritime Court has jurisdiction when the claim for wages is under £50 (p. 69), and enable the Judge, if he thinks proper, to allow a sum in gross not exceeding ten dollars in lieu of all cost.

In the next part of this paper attention will be given to the summary jurisdiction as to seamen's wages recently conferred upon Police Magistrates and Justices of the Peace in this Province.

(To be concluded.)

ALFRED HOWELL.

EDITORIAL REVIEW.

Regina v. Hodge in the Privy Council.

If their Lordships of the Privy Council had confined themselves within the limits which they assigned themselves in giving judgment in this case, or if, at any rate, in overstepping their boundaries they had not transgressed the opinions of eminent authorities on criminal law; the judgment would have commanded more admiration and respect. The limits which they assigned themselves are those laid down by Hagarty, C.J., in another case, viz. "That in all these questions of *ultra vires* it is the wisest course not to widen the discussion by discussions not necessarily involved in the decision of the point in controversy." Now the constitutional question before the Court was the right of the Legislature to create such a subordinate legislative body as the License Commissioners; the question whether the Legislature could impose the punishment of hard labour in addition to imprisonment was not properly before them, nor was its decision necessary for the disposal of the appeal; yet their Lordships give their opinion upon it.

After quoting number 15 of section 92 of the British North America Act, they say, "Under these very general terms 'the imposition of punishment by imprisonment for enforcing any law,' it seems to their Lordships that there is imported an authority to add to the confinement or restraint in prison that which is generally incident to it,—'hard labour'; in other words, that 'imprisonment' there means restraint by confinement in a prison with or without its usual accompaniment, 'hard labour:.'" 7 Leg. N. 24. We should also like to learn whether or not their Lordships consider solitary confinement as incident to imprisonment and therefore within the power of the Legislature to impose as a punishment.

We think it very evident that hard labour is not incident to imprisonment in the sense that the punishment of imprisonment includes or implies it. Though the punishment of imprisonment is as old as the castles of England, as shown by Sir James Fitzjames Stephen, 1 Hist. Cr. Law, 483-487, hard labour as a punishment was only introduced into England in 1706: Bouvier, Law Dict. Tit. Hard Labour. Imprisonment has been defined as *the restraint of a man's liberty* simply. Conformity to prison discipline is of course implied. It is incident to imprisonment. Are we, however, to infer, from the judgment now in review, that a man sentenced to imprisonment may be set at hard labour as an incident of his punishment?

Coke says, "yet imprisonment must be *custodia, et non pœna*; for *carcer ad homines custodiendos, non ad puniendos dari debet*." Co. Litt. 260 a. Nothing is said as to hard labour.

Blackstone mentions imprisonment in several places in the Commentaries, but in no place does he mention hard labour as incident to it, nor does he, we believe, mention the latter at all.

Comyns' Digest says nothing of hard labour.

Deacon has a separate title for hard labour; and treats it as distinct from punishment by imprisonment alone. 1 Deac. Cr. Law, Tit. Hard Labour. He says, "Various Statutes have inflicted the punishment of hard labour in addition to the penalty of imprisonment for different offences, as the Vagrant Act, 3 Geo. 4, c. 40; the new Larceny Act, 7 & 8 Geo. 4, c. 29, sec. 4; the Act for punishing malicious injuries to property, 7 & 8 Geo. 4, c. 30, sec. 27; and the 7 & 8 Geo. 4, c. 28, sec. 9, for improving the administration of justice."

Stephen defines imprisonment as follows:—"The punishment of imprisonment consists in the detention of the offender in prison, and in his subjection to the discipline appointed for prisoners during the period expressed in the sentence." And he refers to the different kinds of imprisonment as set out in 28 & 29 Vict. cap. 126; Stephen

Dig. Cr. Law, Art. 4. In this Act the expression "sentenced to hard labour" occurs more than once, and the punishment of hard labour is always distinguished from that of imprisonment alone. Is it not fair to argue that the same legislature which passed this Act understood the meaning of the term imprisonment when they used it in the British North America Act? Having but two years before 1867 passed the Act relating to prisons (28 & 29 Vict. cap. 126), in which the most marked distinction is made between imprisonment and imprisonment with hard labour, is it too much to urge that when they used the term *imprisonment* in the British North America Act, they intended that it should have the same meaning which they had but recently attributed to it?

Russell quotes various statutes passed in 24 & 25 Vict., which contain the following clause:—"Whenever imprisonment with or without hard labour may be awarded for any indictable offence under this Act, the Court may sentence the offender to be imprisoned or to be imprisoned and kept to hard labour, etc." 1 Russ. Cr. 80.

The Legislature of Prince Edward Island in 5th Wm. IV. passed an Act "For the more effectual punishment of offenders, by enabling the Supreme Court to add hard labour to the sentence of imprisonment," and by 12 Vict. cap. 12, sec. 2, it is enacted, that "from and after the passing of this Act, it shall and may be lawful for the Supreme Court, in cases of conviction for felony or misdemeanor to order, if it shall see fit, that the person or persons so convicted be kept to hard labour during the term of his or her imprisonment."

It is evident from these authorities that legislatures and jurists have understood hard labour to be not an incident to imprisonment, but a substantive punishment which is sometimes added to the punishment of imprisonment.

As to the right of the Legislature to appoint a subordinate body to make laws, or, as it is usually expressed, the right to delegate its powers, we confess freely that we cannot reconcile this decision with *Regina v. Burah*, L. R. 8 App. Ca. 889. If there existed in Legislatures created

by the Imperial Parliament the right to delegate their legislative functions, *Regina v. Burah* would never have been decided as it was. The whole discussion would have been without sense. The test there was, whether a complete law had emanated from the legislature. If so, the fact that it was brought into force by the Lieutenant-Governor made no difference. Its efficiency as a law was due, not to the Lieutenant-Governor, but to the law-making body of India. In that case, also, their Lordships said, at p. 905, "Their Lordships agree that the Governor-General-in-Council [the law-making body] could not by any form of enactment create in India and arm with general legislative authority a new legislative power not created or authorized by the Councils Act." If then a general legislative body cannot be created, why can a body to legislate on particular subjects only be created? The general is made up of the particulars. If our Legislature, by successively creating subordinate bodies to legislate on particular subjects, should exhaust all the subjects upon which they have power to make laws, or if they should do the same thing by successively assigning one subject after another to the same subordinate body until all were exhausted, we should have all our laws made by a body or bodies not created by the Imperial Parliament. The laws thus made, as the resolutions of the License Commissioners, would not owe their efficiency (to borrow the expression of the Judicial Committee in *Regina v. Burah*) to the Provincial Legislature, but to the subordinate body or bodies.

A very good instance of the distinction between conditional legislation (such as was in question in *Regina v. Burah*) and legislation by a subordinate body or a delegate of the Legislature may be found in a comparison of the Creditors' Relief Act, 1880, 43 Vict. cap. 10 (Ont.) with the Liquor License Act, R.S.O. cap. 181, sec. 4. The Creditors' Relief Act, 1880, is a complete law emanating from the Legislature. It is not to come into force until a day to be named by the Lieutenant-Governor by his proclamation. Yet the Lieutenant-Governor does not thereby make the

law, nor can he add to nor take from it. A transgression of such an Act would be a breach of the law of the Legislature. This is exactly the case of *Regina v. Burah*. The Liquor License Act, sec. 4, on the contrary, is not a complete law. The Commissioners are to make resolutions. By section 5 they may impose penalties for the infraction, not of the Act, but of the resolutions. Here they have power to add to the law. Their resolutions owe their efficacy to the Commissioners, not the Legislature.

Not to prolong the discussion we merely refer to our former remarks upon this subject : 2 C. L. T. 575 et seq. ; 3 C. L. T. 279.

While we bow, with all good subjects of Her Majesty, to the decision of the Privy Council, we must say that it is subject to criticism. It is perhaps the most unsatisfactory judgment on the Act which has been pronounced.

Judicial Robes.

The Court of Appeals of New York have acceded to the request of the Bar and have adopted the fashion of wearing gowns, much to the delight of the *Albany Law Journal* and much to the disgust of the *Central Law Journal*. The latter periodical says, with great solemnity, "It is with painful regret that we acknowledge that the Judges of the New York Court of Appeals have placed themselves in robes. They will be held responsible for this arrogant assumption of superiority and contempt for the people, and the day may come when they will repent that they have heeded the counsel of those men who have but used this movement to demonstrate their influence." When the day comes for them to answer to the people, we venture to suggest that they should be put on trial before a jury of "uniformed patriarchs" or other bedizened citizens that invade this country every summer.

We are forcibly reminded of Sam Slick's commentary upon gowns, which is quite as positive in its tone as that of our contemporary, but a trifle more humorous. Perhaps we may be pardoned the quotation : "Silence, said the

sheriff, and all was as still as moonlight. It looked strange to me, you may depend, for the lawyers looked like so many ministers all dressed in black gowns and white bands on, only they acted more like players than preachers, a plaguey sight. But, said I, is this not the case in your country—is there not some sort of professional garb worn by the bar of the United States, and do not the barristers and the court exchange those salutations which the common courtesies of life not only sanction but imperatively require as essential to the preservation of mutual respect and general good breeding? What on airth, said the clockmaker, can a black gownd have to do with intelligence? Them sort of liveries may do in Europe, but they don't convene to our free and enlightened citizens. It's too foreign for us, too unphilosophical, too feudal, and a remnant of the dark ages. No sir; our lawyers do as they like. Some on 'em dress in black and some in white; some carry walking-sticks and some umbrellas, some whittle sticks with pen-knives and some shave the table, and some put their legs under the desks and some put 'em a-top of them, just as it suits them. They set as they please, dress as they please, and talk as they please; we are a free people. I guess, if a judge in our country was to order the lawyers to appear all dressed in black, they'd soon ax him who elected him director-general of fashions, and where he found such arbitrary power in the Constitution as that, committed to any man."

The Western Jurist.

This journal, which was a well conducted periodical, has amalgamated with the *American Law Review*, which now represents what were formerly three distinct publications. If the rate of mortality continues the United States will have very few first rate Law Journals left.

NOTES OF RECENT DECISIONS.

Bradley v. McIntosh, ante p. 126. A parallel case has just been decided in the Supreme Court of the United States, *Vogel v. Gruaz*, decided 4th February, 1884. It was an action for slandering the plaintiff. The words charged were spoken to a State Attorney in Illinois, whose duty it was to "commence and prosecute" all criminal prosecutions. The attorney was consulted by the defendant as to whether certain facts which he communicated made out a case of larceny against the plaintiff. The Court held that the communication would have been privileged on the ordinary ground of the relation of attorney and client that existed between the attorney and the defendant, and that it made no difference that the attorney in this case was the State Attorney. "It made that relation more sacred on the ground of public policy," said Blatchford, J., who delivered the judgment of the Court.

The learned Judge then proceeds as follows :—

"But, there is another view of the subject. The matter concerned the administration of penal justice, and the principle of public safety justifies and demands the rule of exclusion. In *Worthington v. Scribner*, 109 Mass. 487, an action for maliciously and falsely representing to the Treasury Department of the United States that the plaintiff was intending to defraud the revenue, it was held that the defendant could not be compelled to answer whether he did not give to the Department information of supposed or alleged frauds on the revenue contemplated by the plaintiff. The principle laid down in that case was, that it is the duty of every citizen to communicate to his government any information he has of the commission of an offence against its laws; and that a Court of Justice will not compel or allow such information to be disclosed, either by the

subordinate officer to whom it is given, by the informer himself, or by any other person, without the permission of the government, the evidence being excluded not for the protection of the witness or of the party in the particular case, but upon general grounds of public policy, because of the confidential nature of such communications. The authorities are collected and reviewed in that case. The case of *Dawkins v. Rokeby*, L. R. 8 Q. B. 255, there cited, was affirmed by the House of Lords, L. R. 7 H. L. 744. See also 1 Greenleaf on Evidence, sec. 250; *Black v. Holmes*, 1 Fox & Sm. 28.

It makes no difference that there was evidence of the speaking of the same words to persons other than Mr. Cook, and that the speaking of them to Mr. Cook was not the sole ground of action or of recovery. The evidence was incompetent, and it must be inferred that it affected the minds of the jury both on the main issue and on the question of damages.

It results from these views that the judgment below can not be upheld, and that it must be reversed, and the case be remanded to the Circuit Court, with direction to set aside the verdict and vacate the judgment and take such further proceedings as may be according to law and not inconsistent with this opinion."

BOOK REVIEWS.

1 Selection of Precedents of Pleading under the Judicature Acts in the Queen's Bench and Chancery Divisions. With notes explanatory of the different causes of action and grounds of defence; and an introductory treatise on the present rules and principles of pleading as illustrated by the various decisions down to the present time. By JOHN CUNNINGHAM, Esq., of the Middle Temple, Barrister-at-Law; and MILES WALKER MATTINSON, Esq., of Gray's Inn, Barrister-at-Law. Second edition by MILES WALKER MATTINSON, Esq., and STUART CUNNINGHAM MACASKIE, Esq., of Gray's Inn, Barristers-at-Law. London: Stevens and Haynes. 1884.

The introduction of the new rules in England made a new edition of this excellent work a necessity. The authorities cited are of necessity cases decided under the old rules or prior thereto. The notes containing these authorities are replete with substantive law, and will be found most useful to pleaders under our own system, as well as to those who are under the jurisdiction of the new English rules. Indeed, the precedents themselves may well be consulted, for though in some cases they are mere skeletons and suitable for the new style of pleading only, in most cases their concise and clear statements of the naked facts sufficient in law to sustain the action on the one hand, or to displace or excuse any liability on the other, make them excellent models of pleading. The prefatory treatise on parties and pleading has been prepared with care, and some valuable information on the obscure practice of counter-claiming is condensed into ten pages of the work.

The General Rules and Orders of the Courts of Law and Equity of the Province of Ontario, passed prior to the

Ontario Judicature Act, 1881, and now remaining in force. With notes by GEORGE SMITH HOLMESTED (Registrar of the Chancery Division, H.C.J.), Vol. I. The Chancery Orders. Toronto: Rowsell & Hutchison. 1884.

For a short time after the Ontario Judicature Act, 1881, was passed, Taylor's Orders could have been bought for a few cents. Gradually, however, practitioners began to find out that, either from force of habit or force of law, many of the Chancery orders exercised an active influence upon the practice in the Chancery Division. Whether these orders are actually in force or not can only be discovered, of course, by judicial determination. Mr. Holmested's opinion however, based as it is upon great experience in Chancery practice, must be accorded its due weight, and it will afford material and greatly needed assistance to practitioners in their searches for the living rules of procedure.

There is scope for much criticism in the book, but in this more than in any undertaking, are errors of judgment pardonable, and not to be mentioned in comparison with the value of the whole work.

A copious index adds to the practical usefulness of the work; but we cannot say as much for the rather lengthy treatise on *Addenda et Corrigenda*, as the subject has been exhausted by previous authors.

The Law of Expert and Opinion Evidence reduced to Rules. With illustrations from adjudged cases. By JOHN D. LAWSON, author of "Words and Phrases," "Usages and Customs," etc. St. Louis: F. H. Thomas & Co., 1883.

Mr. Lawson has adopted the plan of formulating in a concise manner the several rules of the law of evidence of experts. Each rule is then illustrated by the citation of a state of facts to which the rule applies. The facts stated are the facts of a decided case to which reference is made. Following the illustrations is a short treatise.

This is but exhibiting the theory of the Common Law. The principle or rule exists unwritten. The cases are the illustrations of the principle ; they exhibit its application. Practically, the rule is deduced from a perusal and comparison of the cases. Such a treatise as the present involves, first, the labour of finding and digesting all the cases upon each subdivision of the subject, then, their comparison with a view to ascertaining what rule or principle is common to all of them, and lastly, the expression in concise and unambiguous language of the rule thus evolved. An immense amount of labour is thus saved to the practitioner. He finds a rule stated either directly for or against him, and the authorities are at hand to verify it. A large portion of the work is devoted to opinions on handwriting, which form the most complete treatise upon that branch of expert evidence that we have seen.

The book is most useful, both in contents and mode of treatment, and its originality of style bids fair to work a revolution in text writing.

RULES OF THE SUPREME COURT OF JUDICATURE, ONTARIO.

The following rules and orders have been passed by the Supreme Court of Judicature:—

544. Ordered, that rule 324 (a) be rescinded and the following substituted therefor:— Upon the hearing of such motion the court may grant the application on such terms and conditions as may be thought proper or may refuse the same; or instead of either granting or refusing the same may give such directions for the examination of either parties or witnesses, or for the making of further enquiries, or with respect to the further prosecution of the suit, as the circumstances may require; and upon such terms as to costs as the Court thinks right.

545. In actions in the High Court of Justice no reference to arbitration or other reference or examination for the purpose of discovery or examination of a judgment debtor on which fees may be payable otherwise than in law stamps shall be taken before the Judge of the County Court or Local Judge of the High Court, or Local Master, being also a Judge of the County Court, by whom the order for such reference or examination has been made.

THE CANADIAN LAW TIMES.

OCCASIONAL NOTES.

Supreme Court of Canada.

ONTARIO.]

ROSENBERGER v. THE GRAND TRUNK RAILWAY CO.

*Railway—Failure to sound whistle—Accident from horse taking fright—
C. S. C. cap. 66, sec. 104—Findings of Jury—Evidence.*

Held, affirming the judgment of the Court of Appeal for Ontario, 3 C. L. T. 449, that Consolidated Statutes of Canada, cap. 66, sec. 104, must be construed as enuring to the benefit of all persons who, using the highway which is crossed by a railway on the level, receive damage in their person or their property from the neglect of the railway company's servants in charge of a train to ring a bell or sound a whistle, as they are directed to do by said statute, whether such damage arises from actual collision or as in this case by a horse being brought over near the crossing and taking fright at the appearance or noise of the train.

The jury in answer to the question, "If the plaintiffs had known that the train was coming, would they have stopped their horse farther from the railway than they did?" said "Yes."

Held, that, though indefinite, this taken with the evidence on which the jury acted, and not having been objected to by counsel at the time it was put by the Judge, was sufficient to support the verdict.

James Bethune, Q.C., for the appellants.

Bowlby, for the respondent.

NOVA SCOTIA.]

THE ANCHOR MARINE INSURANCE COMPANY v. KEITH.

*Marine policy—Voyage policy—Mortgagee assigning as collateral security
 --Insurable interest—Total loss—Right to recover—Notice of abandonment by Mortgagee—Constructive total loss.*

While the barque *Charley* was at Cochin on or about the 12th April, 1879, the master entered into a charter-party for a voyage to Colombo, and thence to New York by way of Alippa. The vessel sailed on the 22nd April, 1879, and arrived at Colombo, which place she left on 13th May, and while on her way to Alippa she struck hard on a reef and was damaged and put back to Colombo. The vessel was so damaged that the master called to the ship's husband at New York on the 23rd May, and in reply received orders to exhaust all available means and do best he could for all concerned. The repairs needed were extensive and it was impossible to get them done there. Bombay, 1,000 miles distant, was the nearest port. After proper surveys and cargo discharged, on 10th June, the vessel was stripped, and the master sold the materials in lots at auction. On 21st May, the respondent, a mortgagee of 46 shares in the vessel, which he had assigned to the Bank of Nova Scotia by endorsement on the mortgage as a collateral security for a pre-existing debt, being aware of the charter from Cochin to New York, insured his interest with the appellant company, the nature of the risk being thus described in the policy:—"Upon the body, etc., of the good ship or vessel called the barque *Charley*, beginning the adventure (the said vessel being warranted by the insured to be then in safety) at and from Cochin *via* Colombo and Alippa to New York."

To an action on the policy for a total loss, the defendants pleaded *inter alia*, (i) that the plaintiff was not interested; (ii) that the ship was not lost by the perils insured against; (iii) concealment. A consent verdict for \$3,206 for plaintiff was taken, subject to the opinion of the Court upon points reserved to be stated in a rule *nisi*, and upon the understanding and agreement that everything which could be settled by a jury should upon the evidence given be presumed to be found for the plaintiff.

Held, (i) That this was a voyage policy, and that the warranty of safety referred entirely to the commencement of the voyage and not to the time of the insurance. (ii) That the fact of the plaintiff having assigned his interest as a collateral security to a creditor did not divest him of all interest, so as to disentitle him to recover. (iii) That the vessel in this case being so injured that she could not be taken to a port at which the necessary repairs could be executed, the mortgagee was entitled to recover for an actual total loss, and no notice of abandonment was necessary.

Per Strong, J. A mortgagee, upon giving due notice of abandonment, is not precluded from recovering for a constructive total loss.

MacLennan, Q.C., for the appellants.

W. Graham, Q.C., for the respondent.

THE MERCHANTS' MARINE INSURANCE COMPANY OF
CANADA v. RUMSEY.*Marine policy—Construction of—Trading voyage—Insurable interest.*

The respondents (plaintiffs), by an arrangement with S. and others who had chartered the schooner *Mabel Claire* for a trading voyage from Nova Scotia to Labrador and back, were to furnish the greater part of the cargo, and were to have complete control of all the goods put on board the vessel until it should return, when the return cargo was to be disposed of by the plaintiffs, who were to pay themselves for their advances, and pay over any balance remaining to S. and others. In trading on the voyage, S. and others were not to dispose of any goods on credit, but were to bring back such goods as they could not dispose of, so as to obtain a return cargo in lieu thereof. The plaintiffs put on board the vessel at Halifax merchandise to an amount exceeding \$6,000, and after having done so, and upon the day on which the vessel sailed from Halifax, effected with the appellants (defendants) the policy sued upon, and an extract from which is as follows:—"Rumsey, Johnson & Co. have this day effected an insurance to the extent of \$2,000 on the undermentioned property, from Halifax to Labrador and back to Halifax on trading voyage. Time not to exceed four (4) months, shipped in good order and well conditioned on board the schr. *Mabel Claire*, whereof Mauser is master, this present voyage. Loss, if any, payable to Rumsey, Johnson & Co. Said insurance to be subject to all the forms, conditions, provisions and exceptions contained in the policies of the company, copies of which are printed on the back hereof. Description of goods insured, merchandize under deck, amount \$2,000, rate 5 per cent., premium \$100 to return two (2) per cent., if risk ends 1st October, and no loss claimed; additional insurance of \$5,000, warranted free from capture, seizure and detention and the consequences of any attempt thereat." Against the respondents' right to recover, it was contended that they were merely unpaid vendors, and that goods previously put on board at Liverpool, N.S., were not covered by the policy, and that it was not to cover the return cargo.

Held (affirming the judgment of the Court below, discharging a rule *nisi* to set aside a verdict for the plaintiffs), that the policy covered the merchandize under deck put on board at Liverpool, N.S., as well as the other goods put on board as return cargo.

Held, also, that there was sufficient evidence to show that the plaintiffs had an insurable interest in all the goods obtained and loaded on the vessel.

Hatton, for the appellants.

Graham, Q.C., for the respondents.

NEW BRUNSWICK.]

VENNING v. STEADMAN, VENNING v. HANSON, VENNING v. SPURR.

Trespass—31 *Vict. cap. 60, secs. 2, 19 (D)*—*Order-in-Council, 11th June, 1879*—*Construction of—Fishery Officer—Action against—Notice not necessary—Damages excessive.*

Three several actions for trespass and assault were brought by A., B. and C., respectively, riparian proprietors of land fronting on rivers above the ebb and flow of the tide, for forcibly seizing and taking away their fishing rods and lines, while they were engaged in fly-fishing for salmon in front of their respective lots. The defendant was a Fishery Officer, appointed under the Fisheries Act (31 *Vict. cap. 60*), and justified the seizure on the ground that the plaintiffs were fishing without licenses in violation of an order-in-Council of June 11th, 1879, passed in pursuance of section 19 of the Act, which order was in these words:—"Fishing for salmon in the Dominion of Canada, except under the authority of leases or licences from the Department of Marine and Fisheries is hereby prohibited. The defendant was armed and was in company with several others, a sufficient number to have enforced the seizure if resistance had been made. There was no actual injury. A. (who was a County Court Judge) recovered \$3000, afterwards reduced to \$1500, damages; B. \$1200; and C, \$1000.

Held, that sections 2 and 19 of the Fisheries Act, and the Order-in-Council of the 11th June, 1879, did not authorize the defendant, in his capacity of Inspector of Fisheries, to interfere with A. B. and C.'s exclusive right as riparian proprietors of fishing at the *locus in quo*.

Held, also, Gwynne, J., dissenting, that when the defendant committed the trespasses complained of he was acting as a Dominion Officer, under the instructions of the Department of Marine and Fisheries, and was not entitled to notice of action under C. S. N. B. cap. 89, sec. 1, or cap. 90, sec. 8.

Harrison and Burbidge, for the appellant.

Wetmore, Q.C., for the respondents.

ONTARIO.

High Court of Justice.

QUEEN'S BENCH DIVISION.

[THE DIVISIONAL COURT, 8TH MARCH, 1884.]

STAR KIDNEY PAD CO. v. GREENWOOD.

Sale of goods—Misrepresentation—Rescission of contract.

K., acting as agent for the plaintiff Company, his wife, but which was in reality a trading name for his own business, fraudulently represented that certain goods, manufactured by himself, possessed curative or medicinal qualities, and were saleable, and thereby induced the defendant to buy a quantity and to give his promissory note therefor. In an action on the note by the plaintiff Company, the defendant counterclaimed for the amount of the note which he had been obliged to pay to an innocent holder. The jury found that he had been induced to purchase by the misrepresentations, and that he had received no consideration for the note.

Held, that he was entitled to recover against the plaintiff Company the damages sustained without having previously offered to return goods.

J. H. Macdonald, for the plaintiffs.

Osler, Q.C., for the defendant.

KERR v. THE CANADIAN BANK OF COMMERCE.

Assignment for creditors—Validity of—Trust to pay partnership debts only—Power to pay off liens in full.

W. & W. made an assignment of all their assets, both separate and partnership property, to the plaintiff in trust to realize and pay "all the just debts of the said creditors of the said debtors rateably and proportionately and without preference or priority." There was a proviso that the trustee might pay any creditor in full whose debt constituted a lien on any part of the assets, whenever he deemed it advisable so to do. It appeared that one of the partners had no property and owed but \$110, and that the other had some household furniture which was seized for rent and that besides the rent he owed less than \$100.

Held, Cameron, J., dissenting, that the assignment was not void in providing for payment of partnership creditors only.

Per Armour and Cameron, JJ. The provision that the trustee might pay off any lien or charge on the assets did not invalidate the assignment.

The assignment could not be held to be wholly void, as it included real estate and book debts, neither of which are within R. S. O. cap. 118.

GILES v. MORROW.

Action for dower—Motion to set aside report—Time for moving.

The report in an action for Dower was filed on 29th May, during the Easter sittings of the Court. A motion was made against it within the first four days of the Michaelmas sittings.

Held, that the motion was too late, for it should have been made to a vacation Judge under Rules 482 and 483.

WALTON v. APJOHN.

Ontario Election Act—Algoma Election—Refusing votes—Deputy Returning Officer—Ministerial Officer—Boundary of Ontario—Right of Deputy Returning Officer to question—Notice of action—Malice—Execution of commission.

At the election of a member of the Legislative Assembly of Ontario in and for the District of Algoma, six persons tendered their votes and offered to take the necessary oaths required by the Election Act to entitle them to vote. The Deputy Returning Officer refused the vote of one because he could not produce his title deeds, and those of the others because they had no houses on their lands. In an action for penalties for refusing the votes, five of those who had tendered votes proved their right to vote.

Held, that the duties of a Deputy Returning Officer are ministerial (save when he suspects personation, want of qualification, etc., in which case he should exercise his judgment as to administering the oath), and, having refused the tendered votes of those who had proved their right to vote, he was liable to the penalties prescribed by the Act.

One Anderson, when tendering his vote, was not able to describe his land accurately, stating that it was in one of three townships which he named. His vote was refused on the ground that he had no house on his land.

Held, Hagarty, C.J., doubting, that the Deputy Returning Officer was liable for the penalty for refusing this vote.

Held, that the question of whether or not the polling division in question was within Ontario or not could not be raised by the Deputy Returning Officer acting under a writ for an election in Ontario.

Held, also, that notice of action was not necessary, nor was it necessary to aver or prove malice.

Held, also, that where a foreign commission had been opened before trial for the convenience of parties, it was too late at the trial to object to the mode of its execution.

In re MURCAR v. BOLTON.

Letters patent to tenant for life, remainder to tenants in common in fee
— *Partition—Sale of life estate—Prohibition.*

The Crown by letters patent granted land to F. B. for life with remainder to the plaintiffs as tenants in common in fee simple. On a petition presented to the Judge of the County Court of the County of Bruce for partition or sale, it was ordered that the lands should be sold. A motion for a prohibition was made on behalf of F. B., the tenant for life.

Held, Armour, J., dissenting, that the case did not come within the Partition Act, and that there was no power to compel a sale of the land as against the tenant for life.

LOCKIE v. TENNANT.

Third party—Joinder—Relief as against.

The action was upon promissory notes made by the defendant to the order of the B. A. L. Co. and by them endorsed to the plaintiff. The defendant claimed indemnity against the B. A. L. Co., and at the trial that Company was made a third party, and judgment was directed to be entered against them in favour of the original defendant to indemnify him against the judgment rendered against him at the suit of the plaintiff.

Held, reversing the order making the Company a third party and the judgment against them, that third parties should be joined only before trial, and that in any case they can be joined only for the purpose of binding them by the judgment against the original defendant; and that in order that the original defendant may obtain indemnity against a third party he must bring a separate action.

[CAMERON, J., MARCH, 1884.

*In re DOVER & CHATHAM.**Municipal Act—Drainage—Award—Report of Surveyor.*

The report and plans of the surveyors, made under R. S. O., cap. 174, secs. 529, et seq., preparatory to the undertaking of drainage works affecting two Municipalities, should be so specific as to indicate what is intended to be done in respect of which the servient Municipality is to bear any expense.

The property owners petitioned that a certain drain should be deepened and enlarged. The surveyor reported that the work to be done would extend from a certain road in the Township of Chatham, to a little beyond a certain street in the Township of Dover, that the work would improve the drain and would afford a much needed outlet to all the lands draining into a certain stream; that the drain would benefit lands in both Townships. The plans did not show where the work would commence or where it would end. The report stated that the drain when completed should be kept in repair by Chatham, at the joint expense of Chatham and Dover, and the lands in Dover should be assessed in proportion therefor, but the proportion was not defined.

Held, that as the report did not conform to the requirements of the Municipal Act, R. S. O. cap. 174, secs. 529 et seq., an award confirming the assessment made by the surveyor was invalid.

COMMON PLEAS DIVISION.

[THE DIVISIONAL COURT, 7TH MARCH, 1884.

DUCK v. THE CORPORATION OF TORONTO.

Municipal Corporation—Highway out of repair—Accident—Negligence—Notice.

The plaintiffs were driving along a well paved street in Toronto, at about 9 o'clock p.m., the night being dark, and the horse stumbled and fell, and the plaintiffs were thrown out of the waggon and injured. The jury found that the accident was caused by the waggon coming in contact with a drain or hole. This drain had been opened across the street and after having been filled in with loose earth the rain had washed down the earth and left the hole open. Between Sunday, the day of the rain, and Thursday, the day of the accident, some residents in the neighbourhood had placed some poles in the drain in an endeavour to make it less dangerous.

Held, that the fact whether the accident was caused by the drain or the poles was immaterial, for under the circumstances the defendants must be deemed to have had notice of the condition in which the drain was at the time of the accident.

Osler, Q.C., and *Small*, for the plaintiffs.

McWilliams, for the defendants.

HARRISON v. LEACH.

Local Judge of High Court—Order for speedy judgment—Jurisdiction to vary order.

On 19th January, the plaintiffs obtained an order for speedy judgment from the Local Judge of the High Court at London, Ont., under which judgment was signed and execution placed in the sheriff's hands. It was the practice of both the Local Judges in that County to insert a provision that all creditors whose writs of summons had issued prior to that of the creditor applying for the order should be allowed to come in and share rateably with such creditor, provided they had obtained judgments within a limited time. The plaintiffs' solicitors were not aware of such practice, and in good faith obtained the order without such provision, nor did the learned Judge suggest its insertion. Another creditor, whose writ was issued prior to that of the plaintiffs, obtained a summons from the Local Judge, calling on the plaintiffs to show cause why this provision should not be inserted; and on the return thereof, on the 24th January, the learned Judge made an order amending the order previously made by him by requiring the provision as to rateable distribution to be inserted therein, and directing the sheriff to be governed thereby.

Held, affirming the decision of Cameron, J., who reversed the order of the 24th January, that the Local Judge had no power to vary the order granted by him, after it had been acted upon, there being no concealment or fraud shown.

R. M. Meredith, for the appeal.

G. M. Rae, contra.

MURPHY v. DALTON.

Clearing land—Fire—Sudden rising of wind—Negligence.

The defendant, for the purpose of clearing his land, set out fire on the same. There was a three acre lot, taken out of the south-east corner of the defendant's lot, on which there was a mill, and near the mill a quantity of lumber belonging to the plaintiff. The defendant set out the fire on Monday, but before doing so consulted with the plaintiff who agreed that

the weather was favourable for the purpose, the wind blowing in a direction away from the plaintiff's property. In setting out the fire he burnt up around the plaintiff's property so as to prevent the fire from spreading to it in case of change of wind. The wind continued in the same direction on Tuesday and Wednesday, and in the interval there were falls of rain, in consequence of which the defendant did not keep a watch over the fire. On Thursday morning there were indications of a change of wind and the defendant sent his son to watch the fire, but when the latter arrived on the ground the wind was blowing at the rate of from thirty-five to forty miles an hour, and by reason of this sudden rising of the wind the fire was communicated to the plaintiff's lumber, which was destroyed. The evidence showed that even if the defendant had been watching the fire he could not have prevented its spreading.

Held, that the defendant was not liable for the damage sustained by the plaintiff.

Osler, Q.C., for the plaintiff.

Falconbridge, for the defendant.

NOTT v. NOTT.

Arbitration and award—Execution of award.

Three arbitrators, at the close of the evidence, agreed on their finding, and a minute thereof was made in writing by one of them, but not signed. It was understood that nothing further was to be done but to have a formal award drawn up and executed. The next day the award was drawn up and executed by two of the arbitrators in the presence of each other, but in the absence of the third arbitrator who some days afterwards executed it in the presence of one of the other arbitrators.

Held, that the award should have been executed by the three arbitrators together, and not having been so executed was invalid.

Marsh, for the plaintiff.

C. Ritchie, for the defendant.

WILTON v. NORTHERN R. W. CO.

Railway—Accident—Negligence—Contributory negligence—Automatic bell.

The defendants' track crossed the highway at an acute angle and was some seven feet above the highway, which was graded up to it, and the view was obstructed by some bushes. The plaintiff was driving a yoke of oxen and sleigh along the road, when, just as he came on the track, he saw a train approaching, and jumped on the off side to the track and hit the off ox to make him spring aside and clear the track, but before the plaintiff could get clear himself he was struck by the train and injured. On the part of the plaintiff it was shown that the bell was not rung nor the

whistle sounded. The defendants proved that the bell used was an automatic bell, rung by the action of the wheels, and that it was ringing when the engine left the last station. One of the plaintiff's witnesses stated that these bells get out of order. The jury found that the whistle was not sounded nor the bell rung; that the automatic bell was not in good order, and that the plaintiff under the circumstances exercised reasonable care.

Held, that it could not be said that the findings were not justified by the evidence, and the Court therefore refused to interfere.

Creasor, Q.C., for the plaintiff.

Osler, Q.C., for the defendants.

MAUGHAN v. CASCI.

Conveyance of lots on registered plan—Lane—Easement—Short Forms Act.

The trustees of C.'s will, by contemporaneous conveyances under the Short Forms Act, conveyed a farm in six parcels according to a registered plan to the six surviving children of the testator. The farm had theretofore been held by unity of title. The description of parcel 2 included a lane, described in the plan as a right of way the use of which was reserved in the deed for the owners of parcels 4 and 6 which adjoined it, and to which it was a way of necessity. The parcel 3 which adjoined the way (but to which it was not a way of necessity) was conveyed without any mention of the lane.

Held, that the grantee of parcel 3 could not claim a right of way over the lane.

Held, also, that the Act respecting Short Forms of Conveyances did not apply, because of the exception expressly made in the deed in favour of parcels 4 and 6; that there was not a continuous easement, and that the way was not a public highway.

Bethune, Q.C., and *J. E. Robertson*, for the plaintiff.

S. H. Blake, Q.C., and *Delamere*, for the defendant.

McFARLANE v. GILMOUR.

Tramway—Accident—Negligence of fellow-servant.

The defendant, the proprietor of extensive mills, constructed a tramway to carry lumber from one end of his yard to the other, and his employees were permitted, for the purposes of their employment, to use the cars, which were drawn by a steam-engine. The track was laid on ties placed on wet ground, very little ballasting was done, and no ballasting was done where the accident happened. The plaintiff, one of the defendant's employees, was going to his work on the car when it was thrown off the track by a

misplaced rail. The defendant employed a competent foreman who delegated the duty of keeping the track in repair to one B., a fellow servant of the plaintiff, who was fully competent to perform the duty; and it was shown that B. had neglected to replace the rail.

Held, that the accident having been caused by the negligence of a fellow-servant the defendant was not liable.

Dickson, Q. C., for the plaintiff.

Bell, Q. C., for the defendant.

MACDONALD v. MURRAY.

Sale of land—Evidence under commission—Certified copy of agreement—Admission at former trial—Evidence taken in shorthand—Admissibility of copy—Interrupting Judge's charge.

Action for purchase money of two lots on Main St., Winnipeg, sold by the plaintiff to the defendant under an agreement signed by all the parties. The agreement was duly registered. The registrar, who was examined under a commission, refused to produce the original, but put in a copy duly certified by himself. Its admission was objected to because the commissioner had not certified to it. The defendants had admitted the agreement at a former trial, but objected to it at the subsequent one. The evidence of one of the witnesses was objected to because it had been taken in shorthand before a special examiner and a copy was put in. Evidence offered in reply to defendants' evidence of fraud was objected to on the ground that he had already given evidence to disprove it. The learned Judge before whom the case was tried decided to nonsuit plaintiff because the agreement had not been properly proved, but allowed the case to go to the jury on the question of fraud. Plaintiff's counsel claimed that the decision to nonsuit, placing the burden of proof on him, gave him the right to reply. Defendants contended that the plaintiff's counsel, by interrupting the Judge during his charge to the jury, influenced the jury in plaintiff's favor and gave defendants a right to a new trial.

Held, (i) that the certified copy of the agreement was sufficient; (ii) the fact of the land being out of the jurisdiction did not oust the jurisdiction; (iii) the evidence of the witness taken in shorthand, was properly admitted; (iv) the evidence offered in reply was properly admitted; (v) the defendants having admitted the agreement at the former trial could not object to it at the subsequent one.

Held, also (i) that, there was no evidence of fraud on the part of the plaintiff; (ii) that the plaintiff had not the right of reply; (iii) as to the objection to the interruptions by counsel, it was for the Judge at the trial to determine, and as he did not interfere, the court refused to do so.

Lash, Q. C., and *Holman*, for the plaintiff.

McMichael, Q.C., *McCarthy, Q.C.*, and *Osler, Q.C.*, for the defendants.

VERRALL v. McAULAY.

Principal and surety—General Inspection Act, 1874, 37 Vict. cap. 45, sec. 6 (D)—Default of Deputy Inspector.

Held, that the liability of sureties on a bond given under the General Inspection Act, 1874, 37 Vict. cap. 45, sec. 6 (D) was not restricted to the default of the Inspector in the duties of his office, but included also the default of a deputy inspector; and that such default was proved.

Creasor, Q.C., for the plaintiffs.

Osler, Q.C., and *Wink*, for the defendant.

CANADIAN PACIFIC R. W. CO. v. GRANT.

Railways — Carriage of goods — Delay — Damages.

The plaintiffs sued the defendant for \$2,700 the balance alleged to be due on the carriage of timber to Quebec. The defendant counterclaimed for damages sustained by reason of the plaintiffs' neglect and delay in furnishing cars as soon as notified that the defendant's timber was ready, whereby the defendant was delayed in loading and forwarding his timber to Quebec. The defendant also claimed damages for plaintiffs' neglect in furnishing cars to carry some 600,000 feet of timber, part of the contract; and also for loss of value of timber by reason of its being kept over until the following year; and expenses caused by the delay in carrying quantity carried.

Held, affirming the judgment of the learned Judge at the trial, that on the evidence the plaintiffs were entitled to recover the \$2,700 claimed by them; and that the defendant was entitled to recover \$1,420 damages under his counterclaim for the delay in loading after notification, but was not entitled to recover any of the other items of damages claimed. Each of the parties to be entitled thereto as if the claim and counterclaim were separate actions.

Bethune, Q.C., for the plaintiffs.

McCarthy, Q.C., and *Plumb*, for the defendants.

MORRISON *et al.* v. EARLS.

Promissory note—Syndicate—Partnership—Sale of land—Misrepresenting price of land—Rescission.

Action on a promissory note for \$1,000 made by the defendant to one M. The note was given in payment of the first instalment of the purchase money of a share in a syndicate formed under an agreement which stated that "We, the undersigned, hereby covenant, promise and agree with each other to form ourselves into a syndicate," to purchase a lot of 300 acres of land in Manitoba from M. for \$50,000 divided into 15 shares of

\$3,333.33 each, to be paid to the trustee of the syndicate; the expenses of purchasing, advertising, selling, etc., to be borne proportionately by each member according to his share; appointing M. trustee to form the syndicate; and, on completion, the members were to re-appoint M. or any other person trustee to carry out the objects of the syndicate. The syndicate was completed and the defendant appointed trustee, and a conveyance of the land made to him. It appeared that M., by fraudulently representing to defendant that the price he (M.) paid for the land was \$50,000, whereas it was only \$31,000, that it was well worth \$50,000, was suitable for being laid out in town lots, and that it could be readily sold at largely remunerative prices, induced the defendant, who resided in Toronto and had no knowledge or means of acquiring knowledge, but relied upon the truth of his statements, to enter into the agreement. The defendant in consequence asked to have the agreement rescinded and the note delivered up to be cancelled.

Held, that M. was not in a position alone to put an end to the agreement and have the note cancelled, for that the so-called syndicate was in fact a partnership, and as the fraud was that of M. and not of the partnership it could not avoid the agreement so long as all the parties were not asking for its rescission, and that the defendant's remedy must be by cross-action or counterclaim for deceit.

McMichael, Q.C., for the plaintiff.

J. H. Macdonald, for the defendant.

HAMILTON PROVIDENT LOAN CO. v. CAMPBELL.

Interpleader—Right to growing crops.

The plaintiffs were mortgagees of land on which the crops in question were grown. On 15th April, 1882, the mortgagor being in default, the plaintiffs, in consideration of the mortgagor giving them a chattel mortgage on some of his goods, agreed that he should remain in possession as if there had been no default. In June the plaintiffs took proceedings in ejectment, recovered judgment by default on 30th September, and on same day placed a writ of *hab. fac. poss.* in the hands of the sheriff, who took possession thereunder. On 2nd July possession of the land had been taken under the mortgage on behalf of the plaintiffs, but it did not appear that they continued in actual possession. On 11th July the defendant obtained a judgment against the mortgagor for \$860, and on 17th July execution was placed in the sheriff's hands, and he seized and sold the growing crops thereunder. In an interpleader issue to determine the title to the crops on the 17th July,

Held, that on that day the mortgagor was entitled to the possession of the crops as against the plaintiffs, and so therefore was the defendant; and that the plaintiffs' recovery of judgment on 30th September did not estop the defendant from showing his right to the crops on the day on which he claimed them.

Muir, for the plaintiffs.

G. H. Watson, for the defendant.

WEBSTER v. LEYS.

Married woman—Next friend—O. J. Act—Pending business.

In an action by a married woman, commenced before the O. J. Act, it was held on demurrer that the plaintiff must sue by next friend, and an order was made accordingly. Subsequently, and after the passing of the O. J. Act, the next friend became insolvent. On an application to Proudfoot, J., for the appointment of a new next friend, he made an order for such appointment, holding that he was bound by the previous order, and that nothing was shown entitling the plaintiff to take the benefit of the provisions of the O. J. Act.

Held, that the decision of Proudfoot, J., was right.

Black, for the plaintiff.

Kingsford, for the defendant.

FRIED v. GALLOWAY.

Company—Judgment—Action against shareholder of unpaid stock—Set off.

Action against defendant to recover from him in respect of his unpaid stock in a Joint Stock Company the amount of an unsatisfied judgment recovered by the plaintiff against the Company. The defendant set up as a defence that one B. recovered judgment against the Company and duly assigned it to one G. who duly assigned part of the money recovered, to the extent of \$500, to the defendant; which sum the defendant claimed to set off against the plaintiff's claim. The defendant further set up that one M., who was the assignee of the remainder of the judgment, recovered a judgment against the defendant in respect of his unpaid stock, which defendant paid to M., who released the company from their liability on the judgment against them to the extent of \$500. The assignment of part of the judgment to defendant and the recovery of the judgment by M. against defendant were after the commencement of the plaintiff's action.

Held, that the defence set up by the defendant constituted a sufficient defence to the action.

C. Ritchie, for the plaintiff.

W. Cassels, Q.C., for the defendant.

In re LEE.

Extradition—Forgery—Information—Pleading—Evidence—Secondary evidence—Copy of account book—Admissibility of.

The information charged that the informant had just cause to suspect and believe that the prisoner "is accused" of the crime of forgery, but it went on to charge that the prisoner did feloniously forge, etc.

Held, sufficient, the expression objected to being surplusage; and also that the objection was not tenable under the Criminal Act of 1869, the offence being perfectly understood by the Court and prisoner.

Held, also, that in a proceeding of this kind, a plea to the information is not essential.

An objection was taken to the sufficiency of the declaration made by the Governor of the Foreign State under his official seal.

Held, sufficient.

The authorities of a bank refused to allow one of their books to be brought to Canada.

Held, that secondary evidence was admissible.

Murphy, for the prisoner.

Fenton, for the Crown.

HALL v. GRIFFITH, *et al.*

Action, settlement of—Right of Solicitors to costs.

An action brought by a Montreal firm of solicitors for one C. against the now plaintiffs, H. was settled for \$3,700, of which H. paid \$3,000 and gave the solicitors a note for \$5,500 made by the defendants Griffith endorsed by Gimson, and held by H. as endorsee, out of which they were to take the \$700 and their costs. They sent a clerk to Toronto where defendants lived to settle matter but not being able to do so he left the note with M. & Co., a Toronto firm of solicitors, for collection. M. & Co. commenced proceedings and issued a writ which was served on the defendants. After this, C. and the plaintiffs settled the \$700 between them. A settlement was proposed between the solicitors, which M. & Co. agreed to, provided their costs and the clerk's expenses to Toronto were paid, and defendants' solicitors said they would recommend this being done. Negotiations for a settlement had been going on between the parties themselves, and on 26th November plaintiff proposed that defendants should pay \$5,000 clear of every thing to the plaintiff, which, on 2nd December, was accepted by defendants. This settlement was effected without the knowledge of the solicitors. On 4th December, defendants' solicitors were informed of the other parties being interested in the note besides the plaintiff. On 6th December, the parties met and settled matters by plaintiff accepting \$5,000 in full of all claims under the action. The note, which was held by M. & Co., was never delivered up to the defendants.

Held, that the effect of the agreement of 2nd December was that defendants should pay the costs, etc., and that the settlement made on 6th December must either be treated as being intended to carry out such agreement; or, if not, then that the settlement must be deemed to have been made with full knowledge through their solicitors, and they must pay the costs, and that the settlement must be made through M. & Co.; that defendants in choosing to settle the amount of the note with H., without requiring the delivery up of the note, must be held liable for whatever lien or charge C. or others had upon the note, because they were not bound to pay it unless it was given up to them.

[GALT, J., 25TH MARCH, 1884.]

THE ONTARIO & QUEBEC R. W. CO. v. PHILBRICK.

Railway—Tender of compensation for lands taken—Omission to offer crossing until arbitration commenced—Costs.

By sec. 9, s.-s. 19 of the Railway Act, where the sum awarded by the arbitrators as compensation for land taken and damages is not greater than that offered by the company, the costs of the arbitration shall be borne by the opposite party, but if otherwise they shall be borne by the company; and in either case they may, if not agreed upon, be taxed by the Judge. On 2nd August, 1883, the O. & Q. R. W. Co. served P. with the statutory notice of their intention to take $3\frac{42}{100}$ acres of P.'s land, and tendered \$3,635 as compensation therefor and damages. This notice was abandoned, and another notice given on 23rd November offering the same amount of money but reducing the quantity of land to $1\frac{54}{100}$ acres. The offer was refused and arbitration proceeded with. The railway cut off P.'s land from the highway, and on the plan attached to the notice no crossing was shown. The arbitrators met on 27th December, when the company tendered a deed binding themselves to make and maintain a crossing. The arbitrators assessed the compensation and damages at \$3,516, or \$119 less than the amount tendered; but this was after taking into consideration the value to R. of the crossing.

Held, by reason of the offer to make the crossing after the arbitrators met, the tender then made was not the same as that made prior to the arbitration; and therefore the provisions of the section as to costs did not apply.

A rule for a mandamus to the County Judge to tax the costs to the company, and for a prohibition preventing him taxing costs to P. was refused.

Quære, whether the Judge has under the circumstances any power to decide as to costs at all. If he should decide that he has such right, his authority to do so might be questioned by an application to the Court for such purpose.

G. T. Blackstock, for the Company.

McMichael, Q. C., and *Shepley*, contra.

 CHANCERY DIVISION.

[BOYD, C., AND PROUDFOOT, J., 21ST FEBRUARY, 1884.
SMITH v. SMITH.]

Void will—Entry by life tenant thereunder—Estoppel—Right to deny title of those claiming in remainder.

A married woman, in 1828, having no power to make a will assumed to devise the land in question to her daughter and son-in-law for each of their lives, remainder to their children. The defendant, T. J. S., one of their children, went into possession at his father's instance, and remained in possession for more than twenty-eight years. Upon the death of the daughter and son-in-law of the testator their children claiming in remainder asked partition.

Held, reversing the judgment of Ferguson, J., that T. J. S., though he went into possession under the will, was not estopped to deny the title of those claiming in remainder under the will.

[BOYD, C., AND FERGUSON, J.
CORBETT v. HARPER.

Deed, construction of—Modern rule—Timber—Trees "eight inches through," meaning of.

A grantor in a conveyance of a parcel of land "reserves to himself all the standing timber upon the said lands, excepting that which measures eight inches through."

Held, reversing the judgment of Proudfoot, J., that the exception did not include trees of a larger size than eight inches in diameter.

The common law rule as to what is timber applies to Ontario. Therefore, a tree must be twenty years old, at least, before it could be called timber.

The modern rule as to the construction of deeds is that the intention of the parties should be arrived at, if possible, giving to technical words their technical meaning, and not that it should be taken most strongly against the grantor.

Poussette, for the plaintiff.

Hoyles, for the defendant.

[OSLER, J. A., AND FERGUSON, J., 21ST FEBRUARY, 1884.
KITCHING v. HICKS.

Chattel mortgage—Non-registration—Assignment of book debts—Validity of.

Held, affirming the decision of Proudfoot, J., 3 C. L. T. 500, that an assignment of both present and after acquired goods requires registration under the Chattel Mortgage Act, and was void as to goods for want of registration; but,

Held, also, varying the judgment, that the assignment as to book debts which were also included, was good, and should be upheld to that extent.

VAN EGMOND v. THE CORPORATION OF SEAFORTH.
Nuisance—Polluting stream—Municipal Corporation—Injunction—Drainage works—Injury to property.

The defendants, without passing a by-law, constructed a number of surface drains for the purpose of cleansing the streets of the Town. Into these drains certain of the inhabitants emptied filthy water and brine from salt manufactories. The drains emptied into a stream which ran through the Town and after leaving the Town limits ran through the plaintiff's property. The water, by reason of receiving the contents of the drains, became unfit for household and manufacturing purposes, for both of which the plaintiff had formerly used it.

Held, affirming the judgment of Proudfoot, J., that he was entitled to an order restraining the defendants from polluting the stream by means of

the drains, and that he was not bound to bring action against the inhabitants who emptied the filth into the drains.

The defendants, in pursuance of the Municipal Act, R. S. O., cap. 174, secs. 529, et seq. deepened the stream, and for that purpose entered upon the plaintiff's property, taking down fences and making excavations. They left mounds of earth lying on his land after the work was complete.

Held, that the plaintiff was entitled to an order for the levelling or carrying away of the earth thrown up and the restoration of his fences.

[PROUDFOOT, J., 19TH JANUARY, 1884.]

DORLAND v. JONES.

Religious body—Grant for the benefit of—Change in faith and discipline—Confirmation deed—Right of settlor to add new condition.

Land was granted to trustees and their successors to be appointed to hold in trust for the purposes of a certain body of Quakers. Some years afterwards, new articles of discipline and belief, in consonance with views held by Quakers many years before the grant, but not then in vogue, and at the time of the introduction held by the general body of Quakers, were introduced and adopted by a majority. The minority never assented to them. Both parties appointed trustees to hold the lands granted by the original settlements, each party claiming the land.

Held, that as long as any of those remained who adhered to the articles of faith and discipline understood by the settlor to be professed by Quakers at the time of the grant they were entitled to the land as beneficiaries.

Held, that the evidence in this case did not establish the identity of the plaintiffs, who had adopted the new articles, with the original body whom the defendants represented, and therefore they were not entitled to any benefit under the grants.

Held, that a settlor in confirming a grant cannot add to it any stipulation or condition not contained in the original settlement.

Held, that the mode of appointment of trustees of a religious body, and the appointment itself, may both take place at one and the same meeting under R. S. O. cap. 216, sec. 10.

[FERGUSON, J., 21ST FEBRUARY, 1884.]

KIDDER v. SMART.

Patent—Re-issue—Laches.

In an action for an infringement of a patent, it appeared that the patentee had delayed, without excuse, to re-issue his patent for two years, with knowledge of a mistake in the original patent; that he had taken professional advice on the subject; that a re-issue of the patent in the United States had taken place, founded upon the same mistake; and that manufacturing had been going on in the United States under the re-issued patent.

Held, that the re-issued patent was invalid.

[4TH MARCH, 1884.]

KINCAID v. READ.

Improvement to land—Contract with husband of owner of land—Right to recover.

The plaintiff contracted to build and did build a house for one R., a defendant, on land which he afterwards ascertained to have been that of R.'s wife, his co-defendant, who was under age at the time. The land was sold to an innocent purchaser.

Held, that the plaintiff had no equity to recover payment as against the female defendant, but was entitled to judgment against R. for the amount due.

S. H. Blake, Q.C., and Hudspeth, Q.C., for the plaintiff.

H. Cameron, Q.C., and Moore, for the defendants.

THE LONDON AND CANADIAN L. AND A. CO. v. WALLACE.

Will—Direction to carry on business of testator—Mortgage by executors for purposes of business—Liability of executors.

A testator directed his trustees and executors to carry on the business of carrying freight by a schooner, and warehousing, and that they should also work a mine, jointly with the other owners, in which the testator had an interest; and that they should not lay out more than \$1,000 in working the mine. There was no direction as to laying out money in the forwarding and warehousing business. They incurred a debt to a bank for repairs to the schooner and otherwise in the business, not including the working of the mine, to pay which they mortgaged to the plaintiffs lands devised to them in trust.

Held, that they had no power to create the mortgage; and the plaintiffs having notice of the purpose for which the mortgage was created were not entitled to foreclose the same, but were entitled to judgment against the executors personally for the amount advanced to them.

Arnoldi, for the plaintiffs.

Moss, Q.C., for the defendants.

[19TH MARCH, 1884.]

WARDROPE v. CANADIAN PACIFIC RAILWAY CO.

Garnishee process—Attaching order—Primary creditors not creditors of garnishee.

A judgment creditor holding an attaching order against a third party who is the debtor of his judgment debtor is not a creditor of the third party.

The plaintiff had a judgment against one Sykes; Sykes had a judgment against the Brockville and Ottawa Railway Co. The plaintiff obtained an attaching order against the Railway Company, the amount ordered to be paid by which remained unsatisfied. By 27 Vict. cap. 57, sec. 10, the Company was authorized to issue bonds to its creditors. By 41 Vict. cap. 36 (D.) the B. & O. Railway Co. and the Canada Central Railway Co. were amalgamated and the amalgamated Company became liable for

all the debts of the old Companies. By 44 Vict. cap. 1 (D.), the defendants the Canadian Pacific Railway Co. were authorized to purchase the Canada Central Railway Co. and it was admitted that they were liable for all the debts thereof.

Held, that the plaintiff was not by virtue of his attaching order a creditor of the B. & O. Railway Co. under 27 Vict. cap. 57, sec. 10, and therefore could not recover against the defendants.

MacLennan, Q.C. and *Francis*, for the plaintiff.

Lash, Q.C. and *W. H. Walker*, for the defendants.

[24TH MARCH, 1884.]

CITY OF ST. THOMAS v. THE CREDIT VALLEY RAILWAY CO.

Railway Company—Agreement to run trains to a certain station—Breach—Specific performance—Injunction—Damages.

The plaintiffs granted a bonus to the defendants to aid them in the construction of their railway in consideration of a covenant by the defendants to run "all their passenger trains to and from a small station in St. Thomas for the purpose of checking baggage and the accommodation of passengers." After receiving the bonus the defendants ran their trains as agreed for about a year, but then ceased.

Held, that the plaintiffs were not entitled to specific performance of the agreement by injunction, but were entitled to damages only.

McCarthy, Q.C. and *Plumb*, for the plaintiffs.

Robinson, Q.C., Bethune, Q.C. and *G. T. Blackstock*, for the defendants.

IN CHAMBERS.

[BOYD, C., 24TH MARCH, 1884.]

FREEL v. MACDONALD.

Local Master—Jurisdiction where solicitors for all parties do not reside in County.

Held, reversing the decision of the Local Master at Hamilton, that Rule 422 and its sub-section (a) must be read together, and therefore the Local Master has only the powers which the County Judge has as limited by the Rule and its sub-section.

The Local Master at Hamilton made an order for judgment under Rule 80 in this case, the solicitor for the plaintiff residing and having his office in Hamilton, in the County of Wentworth, and the defendant's solicitors residing and having offices in St. Catharines, in the County of Lincoln, and not in the County of Wentworth.

Held, that he had no power to do so under Rule 422.

Holman, for the plaintiff.

Hoyles, for the defendant.

[GALT, J., MARCH, 1884.]

NORDHEIMER v. McKILLOP.

Commission—Credibility of witness proposed to be examined.

A commission will issue to examine a witness, notwithstanding that his character for veracity is impeached. The proper course in such a case is to call witnesses at the trial to impeach his veracity.

McPhillips, for the plaintiff.

Clement, for the defendant.

[CAMERON, J., 14TH FEBRUARY, 1884.]

SMALL v. LYON.

Costs—Discretion of taxing officer.

The defendant brought into Court with his defence a sum which he pleaded was sufficient to answer the plaintiff's claim, and the Judge at the trial, finding that it was sufficient, directed judgment to be entered for the defendant with costs.

Held, affirming the ruling of the taxing officer, that the Judge at the trial having discretion to deal with the question of costs, and having exercised it, the taxing officer had no alternative but to tax to the defendant his full costs incurred, as well before as after the payment into Court.

Shepley, for the appeal.

Aylesworth, contra.

[ROSE, J., 22ND FEBRUARY, 1884.]

LEACH v. WILLIAMSON.

Interpleader—Validity of judgment—Interpleader Act, sec. 10.

Held, affirming the decision of the Master in Chambers, that an interpleader issue between a judgment creditor and attaching creditor may properly be directed under section 10 of the Interpleader Act, R. S. O. cap. 54, to try the validity of the judgment and execution.

The order directed to be tried the validity of the plaintiff's judgment as against creditors generally, and that on the trial it should be open to the attaching creditors to show that the plaintiff's judgment was void as against the attaching creditors as being a preferential and fraudulent judgment.

Held, that the order was right.

Holman, for the appeal.

Aylesworth and *Shepley*, contra.

[29TH FEBRUARY, 1884.]

WATSON v. WIDEMAN.

Changing place of trial.

The plaintiff lived and carried on business in Toronto, the defendants in Parkhill near London, Ont. The action was brought upon a contract to purchase certain goods obtained by an agent of the plaintiff, who

solicited the order in Parkhill, where the contract was signed. The goods were to be delivered by the plaintiff to the Grand Trunk Railway Co. in Toronto for carriage to the defendants. The defence set up fraud in obtaining the contract. The plaintiff proposed to have the action tried at Toronto. The defendants swore that they intended to call six witnesses, that the cause of action arose in Parkhill, and that the expense of a trial at Toronto would be greater by \$30 than at London. The plaintiff swore that he intended to call six witnesses, and to give evidence himself, that four of the six lived in Toronto, one east of Toronto, and one in Parkhill, and that the extra expense of a trial at London would be about \$25.

Held, reversing the order of the Master in Chambers, that the cause of action arose in Toronto and that there was no such preponderance of convenience in favour of London as would justify a change of the place of trial. *Noad v. Noad*, 6 P. R. 48; *Davis v. Murray*, 9 P. R. 222, and *Robertson v. Daganeau*, 3 C. L. T. 266, followed.

F. E. Galbraith, for the appeal.

Aylesworth, contra.

[THE MASTER IN CHAMBERS, 16TH JANUARY, 1884.]

In re SOLICITORS.

Taxation of costs—Bill of costs—Offer to take a smaller sum—Amount on which one-sixth should be computed.

Bills were rendered by solicitors to the amount of \$1,792, but they agreed to take \$1,500. An order was made for taxation upon the application of the solicitors which directed that if one-sixth were taxed off the reduced amount, \$1,500, the solicitor should pay the costs of the reference.

Watson moved to amend the order by directing that the solicitors should pay the costs if one-sixth were taxed off the original amount, \$1,792.

Holman, contra.

Held, that the order was properly made, and that the one-sixth should be computed on the reduced bill and not on the full amount.

[21ST JANUARY, 1884.]

LOVELACE v. HARRINGTON.

Examination of party—Notice of appointment—Time, computation of—Rule 455.

A copy of an appointment to examine the plaintiff was served on the plaintiff's solicitors on a Saturday for a Monday.

Held, insufficient notice under Rule 455.

Holman, for the plaintiff.

Hoyles, for the defendant.

[JANUARY, 1884.]

GAGE v. THE CANADA PUBLISHING CO.

Security for costs—Insolvent surety—Right to new surety.

Where one of the sureties in a bond given to secure the costs in the Court below became worthless, the Master in Chambers held that the respondent was entitled to a new one.

Holman, for the plaintiff.

Dquidson and *W. Barwick*, for several defendants.

BANK OF COMMERCE v. BANK OF B. N. A.

Beneficial plaintiff—Third party—Amendment.

A cheque had been drawn upon the plaintiffs payable to the Hamilton Tool Co., and upon an endorsement purporting to be that of the Tool Co. the defendants cashed the cheque, and presented it to the plaintiffs, who paid the same. The Tool Co. repudiated the endorsement, and the plaintiffs sued the defendants for the amount of the cheque.

This was an application to add a third party, based on an affidavit of the defendants' solicitor, that he had good reason to believe, and did believe, that the third party was the beneficial plaintiff, and that there were equities which would attach as against him if he were a party which would not attach against the present plaintiffs.

The motion was refused, but leave was given to the defendants to amend by alleging that the proposed third party was the beneficial plaintiff, and to set up any defence that might be open to them on that ground.

Aylesworth, for the defendants.

Holman, contra.

ADAMS v. BLACKWELL.

Interpleader—Sheriff's rights.

S. placed an execution in the sheriff's hands on 1st December, and A. one on the 12th December. On 20th December, the landlord claimed rent. The sale took place on 21st December. On 24th December, H. notified the sheriff that he claimed all the moneys in his hands, and not to pay any over to any one else. On 27th December, the sheriff paid S. in full and took a bond of indemnity.

Held, that the sheriff was not entitled to an interpleader order, and a motion therefor was refused with costs.

Aylesworth, for the sheriff.

Holman, for the plaintiff.

H. J. Scott, Q.C., for the landlord.

THE
CANADIAN LAW TIMES.

OCCASIONAL NOTES.

ONTARIO.

Supreme Court of Judicature.

COURT OF APPEAL.

C. P. D.]

[4TH MARCH, 1884.

In re JARRARD.

Extradition—Public book—Alteration—Forgery.

The judgment of the Court below, 4 Ont. R. 265; *ante* p. 39, was affirmed.

Osler, Q.C., for the appeal.

E. Martin, Q.C., and *Fenton*, contra.

PROUDFOOT, J.]

DOBELL v. ONTARIO BANK.

Principal and Surety—Guarantee.

Held, reversing the judgment of the Court below, that the Bank were not bound by what took place between R. and the plaintiffs.

S. H. Blake, Q.C., and *W. H. Walker*, for the appellants.

Robinson, Q.C., for the respondents,

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SIEVEWRIGHT v. LEYS

Trustee and cestui que trust—Auction—Puffer—Trustee's compensation.

The judgment of Proudfoot, J., 1 Ont. R. 375; 2 C. L. T. 353, was affirmed.

Osler, Q.C., and *Black*, for the appellant.

Moss, Q.C., and *Kingsford*, for the respondent.

FERGUSON, J.]

VANSICKLE v. VANSICKLE.

Will, construction of—After-acquired property—Trustee and cestui que trust.

The judgment of Ferguson, J., 2 C. L. T. 147, was reversed.

Per Spragge, C.J.O., and Morrison, J.A. The after-acquired property did not pass under the will; but the evidence showed that the testator was trustee only for his son N., the devisee, subject to a certain charge thereon.

Per Burton and Patterson, JJ.A. The after-acquired property did pass by the will.

Osler, Q.C., and *Smyth*, for the appellant.

Robertson, Q.C., for the respondents.

BRAYLEY v. ELLIS.

Chattel mortgage—Pressure—R. S. O. cap. 118.

The Court being equally divided, the appeal was dismissed, and the judgment of the Court below, 1 Ont. R. 119; 2 C. L. T. 147, affirmed.

Gibbons, for the appellant.

Cassels, Q.C., for the respondent.

Q. B. D.]

[28TH MARCH, 1884.

MACDONALD v. CROMBIE.

Preferential judgment—Sheriff's sale—Purchase by execution creditor—R. S. O. cap. 118.

The judgment of the Court below, 2 Ont. R. 243; 3 C. L. T. 200, was affirmed.

J. H. Macdonald, for the appellants.

Thomson, for the respondent.

CHANCERY DIVISION.]

FOULDS v. HARPER.

Mortgage—Statute of Limitations—Disabilities—Equity of redemption divisible.

Held, reversing the judgment of the Court below, 2 Ont. R. 405 ; 2 C. L. T. 403, that the disability clauses of the Real Property Limitation Act do not apply to actions of redemption, and therefore in this case all the mortgagors were barred ; but

Semble, that otherwise the decree of Blake, V.C., adjudging that the titles of those tenants in common against whom the statutory period of limitation had run were barred, while the titles of those against whom the time had not run were not barred, was right.

It appeared that the mortgagee took proceedings for sale, and one H. bought under the decree and was declared the purchaser by the report on sale. The mortgagee was in reality the purchaser.

Per Spragge, C.J.O. The sale to the mortgagee was a fraud upon the plaintiffs, and voidable, and they had not disentitled themselves to relief by laches.

Per Burton, J. A. An action to redeem a mortgage is not an action to recover land within the meaning of the Real Property Limitation Act.

Street, Q.C., for the appellant.

Cassels, Q.C., for the respondents.

O'DONOHUE v. WHITTY.

Solicitor and client—Costs—Sale under mortgage—Negligence.

The judgment of the Court below, 2 Ont. R. 424 ; 2 C. L. T. 496, was affirmed on the ground that the solicitors had not been guilty of such negligence as to disentitle them to costs as against their client.

Osler, Q.C., for the appellant.

Moss, Q.C., for the respondent.

PROUDFOOT, J.]

HILLIARD v. THURSTON.

Negligence—Fire—Steamboat.

Held, affirming the judgment of Proudfoot, J., that a person working a steamboat without statutory sanction is liable, without proof of actual negligence, for loss occasioned to neighbouring properties by fire communicated thereto by sparks from the funnel.

Moss, Q.C., and *Hudspeth, Q.C.*, for the appellant.

S. H. Blake, Q.C., and *Peck*, for the respondent.

PROCTOR v. TRIPP.

Trustee and cestui que trust—Trustee purchasing trust estate—Laches.

The plaintiff by various conveyances became trustee for W. who subsequently sold to the plaintiff at an undervalue. W. remained in possession for a number of years, and it appeared that his mental faculties were impaired by his intemperate habits. In an action by the plaintiff to recover the land,

Held, that he must still be considered a trustee for W., and that under the circumstances a lapse of sixteen years did not prevent W. from asserting the plaintiff's fiduciary character as a defence to the action.

Moss, Q.C., and *Clute*, for the appellant.

H. J. Scott, Q.C., and *Northrup*, for the respondent.

WRIGHT v. SYNOD OF HURON.

Diocesan Synod—Member—Vested rights.

Held, reversing the judgment of Proudfoot, J., 29 Gr. 348; 1 C. L. T. 729, that there was no contract between the plaintiff and the defendants, and that, the Synod having power to vary and repeal its by-laws, the plaintiff must be assumed to have accepted his stipend with that knowledge and on that condition, and therefore the by-law depriving him thereof was valid.

S. H. Blake, Q.C., for the appellants.

Idington, Q.C., for the respondent.

CAMERON, J.]

VICTORIA MUTUAL FIRE INSURANCE CO. v. THOMPSON.

Mutual Insurance Company—Assessment partly illegal—Notice—Validity of assessment.

The plaintiff company's directors assessed the defendant, a policy-holder, for several sums, one of which, being for re-insurance of certain risks, was illegal. They sent one notice to him claiming the amount of all the assessments, including the illegal one, in one sum.

Held, that the plaintiffs were not entitled to recover any of the assessments.

Robinson, Q.C., and *A. Bruce*, for the plaintiffs.

J. H. Macdonald and *J. R. Roaf*, for the defendant.

FERGUSON, J.]

BANK OF MONTREAL v. HAFFNER.

Mechanic's lien—Mortgagee—Action against owner—Subsequent action against mortgagee after lapse of 90 days.

The plaintiffs, assignees of a mechanic's lien, brought an action against the owner and a prior mortgagee, but their action was dismissed for want of prosecution as against the mortgagee. Having established their lien as against the owner they brought this action, after the expiration of 90 days from filing their lien, to have it declared that their lien took priority over the prior mortgage to the extent to which the work done increased the selling value of the land.

Held, reversing the judgment of Ferguson, J., that their lien had ceased to exist as against the mortgagee, for in order to enforce the lien against all parties having estates or interests in the land they should all be proceeded against within 90 days from filing the lien.

Per Osler, J.A. The judgment of the learned Judge, 2 C. L. T. 552, upon the points there noted was right.

Cassels, Q.C., for the appellants.

H. F. Scott, Q.C., for the respondent.

BADDIN v. SUTHERLAND.

Appeal—Unanimous decision of Divisional Court—Special leave—Judicature Act, sec. 34.

On a motion, under section 34 of the Judicature Act, for leave to appeal from the unanimous decision of a Divisional Court refusing a rule for a new trial where the verdict was for \$500, the Court refused leave because there was not a reasonable prospect of an appeal being successful, though they thought the verdict not entirely satisfactory, and that the Court below in the exercise of their discretion might with great propriety have granted a new trial.

Osler, Q.C., for the motion.

HAMILTON PROVIDENT AND L. CO. v. DUMBLE.

Appeal—Unanimous decision of Divisional Court—Question of fact—Special leave—Judicature Act, sec. 34.

Where a Divisional Court has probably erred upon a point of law upon which the case turned, leave to appeal under section 34 of the Judicature Act may properly be given, especially if other cases are depending upon

the solution of the question; but where the question is one of fact upon which the Court below has exercised its judgment, an application for leave to appeal ought not to be entertained.

In this case an agent of the plaintiff company had made the affidavit of *bona fides* on a chattel mortgage. The learned Judge at the trial left it to the jury to say whether or not he was aware of all the circumstances connected therewith, as required by the statute. The jury answered in the negative, upon which a verdict was entered for the defendant for \$244. The Divisional Court discharged an order *nisi* to set aside the verdict on the ground that the finding of the jury was contrary to evidence.

Held, that leave to appeal should not be granted.

Aylesworth, for the motion.

G. H. Watson, contra.

High Court of Justice.

CHANCERY DIVISION.

[BOYD, C., 12TH MARCH, 1884.]

McDOUGALL v. LINDSAY PAPER MILL CO.

Mortgage action—Reference—Right to dispute mortgage on reference—Company—Ultra vires—Ratification.

Upon a reference to the Master under a judgment for redemption or sale in an action on a mortgage the validity of the mortgage cannot be disputed either by the mortgagor or subsequent encumbrancers. If the latter desire to test its validity they should move against the judgment on being served with notice T.

The mortgage in this case was *intra vires* of the defendant company in all respects, except that it had not been sanctioned previous to execution by a two-thirds vote of shareholders. The fact of the loan and mortgage was however made known to the shareholders at their general meeting the month after the transaction; it appeared in the annual report of the company to its shareholders, and more than a year had elapsed from its inception.

Held, that the inference was that it had been adopted and ratified by the shareholders.

[12TH MARCH, 1884.]

*In re QUIMBY; QUIMBY v. QUIMBY.**Will, construction of—Control of prior clause—Dower—Election.*

A testator directed his trustees to pay his widow an annuity of \$500 a year as long as she remained his widow, but if she married again \$300 a year for life. When his son attained 21 years the trustees were to transfer to him half the estate; but if he attained 30 years they were to transfer to him the whole of the residue subject to the widow's annuity. If the son died before 30 the trustees were to hold "the said real and personal estate, moneys, and securities, or so much thereof as shall remain in their hands in trust to distribute the same according to the Statute of Distributions." The son, the only child, received half the estate, and died after 21 and before 30. The will limited the office of trustee to the appointees of the testator, but in a codicil he changed the trustees and constituted those newly-appointed and the survivor of them, and the heirs, executors, administrators, and assigns of such survivor, trustees.

Held, that the widow was entitled to one-half the estate under the Statute of Distributions, and the later clauses of the will as to distribution were not sufficiently explicit to take away the widow's right to her annuity to which she was therefore also entitled.

Held, also, that the reference to the Statute of Distributions, by which division was to be made, imported an equality of division amongst those entitled to share, which could not take place if the widow first took her dower in the land, and therefore she was put to her election.

[FERGUSON, J., 4TH MARCH, 1884.]

COTTINGHAM v. COTTINGHAM.

Sale of land—Bidding at a sum per acre—Excess of acreage above description—Compensation.

In the advertisement of a judicial sale of lands one parcel was described as "the east part of lot 9, one hundred acres." A bid for this parcel at \$31 per acre, and was declared the purchaser at that price. He, afterwards, on the day of the sale, discovered that there were over 124 acres in the parcel. He paid \$3,100 and took his conveyance describing the land therein as 100 acres more or less, and went into possession and improved the land. This parcel had never been before described with the addition of the phrase "more or less." The vendors acquired knowledge of the overplus about three or four years before action. They now presented a petition to be paid for the excess over 100 acres at the same rate as they had been paid for the 100 acres, with interest and costs.

Held, that they were entitled to the relief asked; but, if they elected to re-take the excess, the purchaser was entitled to the value of his improvements and liable to occupation rent.

S. H. Blake, Q.C., and Hudspeth, Q.C., for the petitioners.

Hopkins, for the respondent.

[10TH MARCH, 1884.]

MAKINS v. ROBINSON.

Mechanic's lien—Conveyance before registration—Taking note for work done—Waiver.

The plaintiff registered a mechanic's lien on 24th August, being within the proper time, for work done for R. & E. On 24th July previous R. & E. conveyed the land to P., who registered his deed on 29th July. There was no contract between the plaintiff and P.

Held, that the lien was valid as against P., and that, notwithstanding that P.'s name was not mentioned in the lien registered.

Held also, that the plaintiff by drawing bills upon R. & E. which they accepted, and by taking their note for the price of the work had not waived his right to a lien.

S. H. Blake, Q.C., and Stewart, for the plaintiff.

G. T. Blackstock, and W. H. Moore, for several defendants.

ORFORD v. ORFORD.

Will, construction of—Devise to trustees to pay over rents—Right of trustees to possession.

A testator devised lands to trustees to hold in trust for the plaintiff and to pay over to him all rents, issues and profits thereof, etc.

Held, that the plaintiff was not entitled to possession of the lands as against the trustees.

Moss, Q.C., for the plaintiff.

S. H. Blake, Q.C., for the defendants.

[PROUDFOOT, J., 25TH MARCH, 1884.]

SHEPPARD v. SHEPPARD.

Partnership—Investment of partnership money—Statute of Limitations between partners.

The plaintiff's father was in partnership with the defendant, and in 1870 the partnership terminated and the effects were sold. The money realized was invested in the purchase of a farm, the conveyance of which was taken in the defendant's name. The plaintiff claimed an interest in the land as administrator of his father.

Held, that he was barred by the Statute of Limitations.

Storm v. Cumberland, 18 Gr. 245; *Wilde v. Wilde*, 20 Gr. 521, distinguished.

C. H. Ritchie, for the plaintiff.

Farewell, for the defendant.

[APRIL, 1884.]

In re MCINTOSH & DUMBLE.*Vendor and purchaser—Dower—Equity of redemption—Partnership property.*

Land subject to mortgages in which dower had been barred was conveyed to an assignee in insolvency. It also appeared that it had been owned by partners, that the buildings thereon had been paid for largely in goods and cash from the shop in which the partners carried on business, that the rents had been collected and paid to the partners, who dealt with them as partnership moneys, and that the land was included amongst their assets upon making the assignment.

Held, that the partners' wives were not entitled to dower.

IN CHAMBERS.

In re SCOTT & THE CITY OF TORONTO.*Arbitration and award—Rule of Court—Second arbitration—Prohibition.*

In opening up Balmuto Street, the City of Toronto expropriated certain lands belonging to Scott. By consent it was referred to arbitration to fix compensation. The submission was made a rule of Court, and an award

was made. This was set aside by the Court, and the option was given by the Court to Scott to have a further reference to an arbitrator to be appointed by the Court. This was declined. Three years subsequently, Scott gave notice of the appointment of a new arbitrator on his behalf, and called upon the City to appoint an arbitrator on their behalf, but they declined to do so, and on application the Judge of the County Court of York named an arbitrator for them. These two arbitrators appointed an umpire, and made an appointment to proceed with the arbitration.

J. K. Kerr, Q.C., on behalf of the City, now moved for a writ of prohibition, on the ground that the matter having been moved into Court and become of record, Scott was not at liberty, without the intervention of the Court, to anew enter upon arbitration.

H. J. Scott, Q.C., contra.

GALT, J., 25th March, 1884, refused the motion with costs.

H. C.

In re EBERTS v. BROOKE.

Division Courts—Action on County Court Judgment—Prohibition.

Held, that an action will not lie in a Division Court on a judgment of a County Court, and prohibition was ordered.

E. Douglas Armour, for the motion.

Aylesworth, contra.

PERKINS v. MISSISSIPPI.

[ROSE, J.]

Foreign defendant—Breach of contract—Cause of action—Rule 45.

An action for damages for breach of contract by the defendants, a corporation in Liverpool, England, for not delivering certain machinery at the railway station nearest to Ottawa, Ontario. The writ and statement of claim were served on the defendants' agent in Montreal, and under Rule 48 the plaintiffs now applied for an order allowing the service on the ground that the case was one within Rule 45. The affidavit made and filed by the plaintiff's solicitor set out that "the paper writing shown to me, marked A, is a true copy of the statement of claim delivered in this action. This action is brought to recover damages for breach of contract on the part of the defendants in not delivering the machinery in the statement of claim mentioned at the railway station nearest to Ottawa under the terms of the contract." The affidavit did not state that the deponent

knew the facts, either of his own knowledge or on information and belief, nor that the defendants even entered into a contract with the plaintiff and undertook to deliver the machinery at the railway station nearest to Ottawa. The bill of lading containing the contract in question provided, *inter alia*, that the machinery in question should be delivered at the port of Montreal unto the G. T. R. Co., and by them should be forwarded, "upon the conditions above and hereinafter expressed, thence per railway to the station nearest to Ottawa, and at the aforesaid station delivered to order * * * freight * * * to be paid by the consignees. That the goods are to be delivered from the ship's deck, when the shipowner's responsibility shall cease. Through goods sent forward by rail are deliverable at the railway station nearest to the place named hereinafter * * * That any loss, damage, or detention of goods on this through bill of lading for which the carrier is liable must be claimed against the party only in whose possession the goods were when the loss, damage, or detention occurred."

Held, (i) that the affidavit did not afford the proof required under Rule 48; (ii) that the bill of lading showed no contract on the part of the defendants to deliver at Ottawa or the nearest station to Ottawa, nor any contract the breach of which was made in Ontario, because if there was such a contract in the bill force and effect could not be given to the stipulations in it that the shipowner's responsibility should cease when the goods were delivered from the ship's deck, etc., and hence, though leave would be given to file further affidavits, such leave was unnecessary; and if there was a contract, and its terms expressly exempted the defendants from any and all liability for damage for any loss, etc., arising beyond their line, no damage for a breach in this Province would result to the plaintiff, and though technically within Rule 45 (c), discretion should, if any exist, be exercised in refusing to allow the service.

In cases of this kind an order allowing service should not be made on an undertaking of the plaintiff's solicitor to prove a cause of action, etc., within the jurisdiction, as it shifts the onus of proof to the plaintiff, and requires him to conduct what may be a long and expensive litigation to procure a decision on a point properly raised at the commencement of the action.

[THE MASTER IN CHAMBERS, 29TH MARCH, 1884.
VANDUSEN v. MALCOLM.]

Pleading and demurring without leave—Rule 193.

To a statement of claim in an action of negligence, the defendants pleaded that the plaintiff was the servant of the defendants in their manufactory, and knew that the machine which caused the injury complained of was a dangerous machine, and that he took upon himself the risk of

working it, and they added the following as a separate paragraph to their defence :—" The defendants further submit, that the plaintiff's statement of claim shows no ground of action against the defendants, and the defendants claim the same benefit of this defence as if the defendants had demurred to the said statement of claim."

H. T. Beck moved to strike out the defence on the ground that it contained a pleading of fact and a demurrer, and that no affidavit of the truth of the facts pleaded or denying the statements in the statement of claim, etc., had been filed therewith, nor a copy served therewith pursuant to Rule 193.

Aylesworth, showed cause.

THE MASTER IN CHAMBERS held that the defence transgressed Rule 193 and made the order asked.

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SEAMEN'S WAGES—MARITIME LAW.

BEFORE proceeding to notice the summary remedy for wages extended to seamen upon the inland waters by the Act of 1882, it is important to notice the conflict of opinion between the decision of the Maritime Court of Ontario in the case of the *Tug Robb* (a) and the decisions of the Vice-Admiralty Court of Quebec in the cases of the *Royal* (b) and the *Monark* (c), upon the question whether the restrictive section (189) of the Merchant Shipping Act, 1854, excluding suits for seamen's wages when the claim is under £50 from Vice-Admiralty and other Superior Courts, except under the special circumstances there mentioned, should be held binding upon those Courts in Canada.

The decision of the learned Judge in the case of the *Robb* rested mainly on the clause of the tenth section of the Vice-Admiralty Courts Act, 1868, which enacts generally that those Courts shall have jurisdiction over "claims for seamen's wages," these words being, as the learned Judge observed, "without limitation or restriction," and the Act itself having been passed to extend and not to limit the jurisdiction, and having been passed subsequently to the Merchant Shipping Act containing the restriction referred to, he held, notwithstanding the case of the *Margaretha*

(a) 17 C. L. J. 66.

(b) 9 Q. L. R. 148.

(c) *Ibid.* p. 214.

Stevenson before alluded to, that the Maritime Court of Ontario had jurisdiction over such claims even though they be less than £50.

In the case of the *Royal*, the learned Judge having remarked upon the advantages accruing to shipping at Quebec from the restriction (section 189) referred to, says that "effect was given to these enactments in the case of the *Margaretha Stevenson*, determined by this Court in 1878," and proceeds as follows:—"I observe that this decision has been questioned by a Court which, although it is one of a limited jurisdiction, still, as an opinion expressed by it, if correct, would unsettle the law in a most important particular, I shall advert to it. In the case of the *Tug Robb*, it was stated that the two sections of the Merchant Shipping Act, 1854, (189, 191), are not to be read in connection with the Vice-Admiralty Court Act, 1863; in other words, the latter repealed the former" (*d*). And the learned Judge then takes strong ground against the position that there was a repeal of the former by the latter enactment by inference or implication, citing *Dwarris* on Statutes, and *MacLachlan* on Shipping, and arrives at the conclusion that the sections referred to had not been so repealed, and that effect must be given to them, except in so far as they have been modified by the Dominion Statute, "The Seamen's Act, 1878," with respect to vessels registered in the Provinces referred to, viz., Quebec, Nova Scotia, New Brunswick and British Columbia (*e*).

In neither of the cases mentioned does it appear that the application clauses (section 109) which precede Part III. of the Merchant Shipping Act, (the part including the restrictive section, 189, above mentioned), and which define and limit the application of that part of the Act, received the attention of the Court, nor does it appear

(*d*) 2 Stu. 192. The learned Judge is probably here giving what he understood to be the effect of the judgment in the *Tug Robb*, for this statement is not to be found in that judgment.

(*e*) The learned Judge had previously mentioned in the same judgment that the sections referred to had been so far repealed by this Act as to reduce £50 Stg. to \$200, as respects vessels registered in the Provinces named.

that those clauses were brought under the notice of the Court. But it is evident that if the restrictive section had by express provision of the Act itself no application to ships such as those in question in the cases mentioned, it would have been wholly immaterial to inquire whether that section had been repealed by inference, implication, or otherwise. Upon reference to section 109, we find, as to the applicability of Part III. to Colonial ships, the following provision :—" So much of the third part of this Act as relates to rights to wages and remedies for the recovery thereof * * * * shall apply to all ships registered in any of Her Majesty's Dominions abroad, *when such ships are out of the jurisdiction of their respective Governments (f)*, and to the owners, masters and crews of such ships." " And that the whole of the third part of the Act is to apply to all *sea-going ships*."

It is laid down that the distinct and pointed enumeration of particular cases to which a statute is intended to apply raises a natural inference that its application is not meant to be general (g). And the maxim *expressio unius est exclusio alterius*, held to be applicable to the interpretation of statutes (h), would exclude from the operation of the restrictive section in question all vessels registered in Canada when they are within the jurisdiction of the Government of Canada. From the report of the case of the *Tug Robb* it appears that that vessel belonged to the Port of Toronto, i. e., Toronto was her port of registry; and from the report of the case of the *Royal* it appears that she was registered in the Province of Quebec; and at the time of the institution of the suit the vessels were within the jurisdiction of their respective Governments, whether the Government of the Province or of the Dominion is to be understood (i).

It, therefore, appears in the light of the application clause referred to that the decision in the case of the *Tug Robb*,

(f) By sec. 13, Vice-Admiralty Court Act, 1863, the jurisdiction of those Courts attaches whether the cause or right of action has arisen within or beyond the limits of such possession. *Vide ante*, p. 161.

(g) *Wilberforce* on Stats. 170.

(h) *Ibid*.

(i) *Vide ante*, p. 161, as to " British Possessions."

in so far as it held that the jurisdiction of the Maritime Court was not excluded by the 189th section of the Merchant Shipping Act, might have been supported on other and perhaps firmer ground than that upon which it was made to rest. At the time of that decision (October, 1880), "The Seamen's Act, 1873," importing, as it does, in section 56, the restriction of section 189, qualified as to the ship by the words "registered in either of the said Provinces," and in other sections, the summary remedy for seamen's wages, and the provisions regarding masters' wages and disbursements of the Merchant Shipping Act into the Maritime Provinces of Quebec, Nova Scotia, New Brunswick, and British Columbia, had not been extended to the inland waters; and the restriction referred to although thus by Dominion Statute evidently binding upon the Vice-Admiralty Court of Quebec, as to ships registered in that Province, at the time of the decision of the *Royal*, had not, by the same or any other statute, been made binding on the Maritime Court of Ontario at the time of the decision of the *Tug Robb*.

If the foregoing view be correct, it would follow that the grounds for difference of opinion between the Vice-Admiralty Court of Quebec and the Maritime Court of Ontario are very much narrower than might be supposed from a comparison merely of the cases of the *Tug Robb* and the *Royal* without reference to the application clauses of the statute above mentioned.

Summary Remedy for Seamen's Wages.—The object of the Legislature in imposing the restriction upon suits for seamen's wages above referred to has been stated in various English cases, and in the case of the *Monark* (j) it is very clearly stated by the learned Judge of the Vice-Admiralty Court of Quebec, who there observes that it was to remedy a serious evil to which the shipping at British ports was exposed, and to prevent frivolous and unfounded suits in the higher Courts, including the Vice-Admiralty Courts, by seamen who were in the habit, particularly at that port

(j) *Supra*.

(Quebec), upon a claim of wages, of instituting suits for trivial amounts, and detaining vessels at an expense of hundreds of dollars, when perhaps not ten, or even any were due. "On the other hand," the learned Judge continued, "cases of oppression by masters of vessels of their men, and the improper retention of their wages occurred, and to meet these evils the 189th section of the Merchant Shipping Act was passed, which precludes the institution of a seaman's suit for less than £50 stg. in this Court; and as respects the seaman, the previous section, the 188th, affords him a remedy in a summary manner before a stipendiary magistrate or any two Justices of the Peace acting in or near the place at which the service has terminated upon a claim not exceeding £50."

After the Maritime Jurisdiction Act (1877) came into operation, and seamen on the inland waters began to invoke its aid to obtain payment of their claims, or enforce liens which they had upon vessels for wages, it was found that by the usual steps in a Maritime Court suit it took several months to carry such a suit through to a decree, and that a serious loss of time was in some cases occasioned to seamen, as well as to vessels during the season of navigation.

It was found also that suits were brought in which the amounts involved were comparatively small, many claims being for sums under \$100, and even going as low as \$10, and that in such cases the taxable costs and disbursements allowed by the tariff in the rules of Court sanctioned by the Government, were disproportionately high, and the work required to be done disproportionately heavy in comparison with the amount involved; while, at the same time, the summary remedy provided by the Merchant Shipping Act and the Seamen's Act, 1873, was held not to apply to the inland waters (*k*).

In the case of the *Tug Robb*, the learned Judge, while holding that the restriction above mentioned did not apply to the Maritime Court of Ontario, expressed the hope that a bill would be brought into Parliament to prevent pro-

(*k*) The *Tug Robb* (*supra*).

ceedings *in rem* being instituted for wages when the claim was under \$100. Possibly the learned Judge, in suggesting \$100 as the limit, instead of \$200, as in the Seamen's Act, 1873, was influenced by the fact, as he had frequent opportunity of observing, that upon the lakes and inland waters, instead of voyages lasting for months, or years, as on the ocean, a vessel makes her trip in a few days or weeks, and the balance of unpaid wages is necessarily small; and that even in the case of engagements by the month, or for the season, the balance due seldom exceeded \$100.

The Act of 1882, 45 Vict. cap. 34, however, does not take away any of the seaman's remedies, but gives him a remedy in addition to any to which he was already entitled. It, in effect, gives him the remedy described in the 188th section of the Merchant Shipping Act, which, as to that remedy, was extended to Canadian tide waters by the Seamen's Act, 1873, with the limiting words as to ships "registered in either of said Provinces" (sec. 52); but not to the inland waters until the Act of 1882. This enactment does not re-enact the sections referred to of the Act of 1873, but shortly provides that "seamen and other persons employed on board a ship on any river, lake, canal, or inland water of which the whole or part is in the Province of Ontario, in addition to any other remedy they may have in that behalf, may recover their wages in the mode and manner provided by the Seamen's Act, 1873, for the recovery of seamen's wages, and with the like remedies for enforcing payment."

Section 3 enables him to proceed for the recovery of his wages so soon as, under his contract of service or by law, his right of action accrues, instead of allowing the three or five days' delay given the owner or master by section 51 of the Act of 1873.

If the intention of the Legislature was to remedy or prevent the evils referred to in the case of the *Monark*, namely, the bringing of suits in Superior Courts for sums under \$200, and if the decision as reported in the case of the *Red Bird* (1)—that sections 56 and 57 have not been

(1) 3 C. L. T. 455.

so extended—it is evident the intention of the Legislature has failed in that respect.

Looking then at the sections of the Act of 1878 which may be considered to come under the words of the Act of 1882—"may recover their wages in the mode and manner provided by the Seamen's Act, 1878, for the recovery of seamen's wages, and with the like remedies for enforcing payment," viz., sections 52 to 55, 58 and 59—and reading these sections in conjunction with the sections of the Act of 1882, above referred to, we find that in this Province the seaman's remedy is that he may sue in a summary manner before any Judge of the Sessions of the Peace, any Judge of a County Court, Stipendiary Magistrate, Police Magistrate, or any two Justices of the Peace acting in or near the place at which the service has terminated, or at which the seaman or apprentice has been discharged, or at which any master or owner or other person upon whom the claim is made is or resides, for any amount of wages due to such seaman, not exceeding \$200 over and above the costs of any proceeding for the recovery thereof, as soon as the same becomes payable; and that such Judge, Magistrate, or Justices may, upon complaint on oath to be made to him or them by such seaman, or on his behalf, summon such master, or owner, or other person, to appear before him or them to answer such complaint (sec. 52).

An order may be made for payment of the wages due and such order is to be final (sec. 53).

If the order be not obeyed within twenty-four hours, the magistrate may issue a warrant to levy the amount by distress and sale of the goods and chattels of the party (sec. 54).

If sufficient distress cannot be found the amount may be *levied on the ship*, or the tackle and apparel thereof (sec. 55).

If the ship is not within the jurisdiction of the Judge, Magistrate, or Justices, then they may cause the party on whom the order for payment is made to be apprehended and committed to the common gaol of their locality or, if there be no gaol there, then to that which is nearest to the

locality, for a time not less than one, nor more than three, months under each such condemnation.

The summary remedy thus given would probably be held to draw with it certain other provisions of the Act of 1873, not included under the heading "mode of recovering wages," but as being *in pari materia* (*m*) viz., secs. 118 and 123, the former of which makes six months the period of limitation, within which, after the cause of complaint arises, proceedings may be commenced, and the latter of which states that the Act does not authorize the execution of any warrant or process of any Justice of the Peace within the jurisdiction of any Court of Vice-Admiralty in either of the said Provinces (before mentioned), unless such execution has been previously authorized by the Judge of such Court of Vice-Admiralty; as to which section it has been held that it imposes upon the Court a duty to supervise the proceedings of the magistrates, and that if the process is not legally issued the petition will be rejected, and also that the duty of the Judge, under this section, is not to be confined to a merely ministerial act, the endorsement of the warrant, the intention of the legislature being that a power of supervision be exercised by the Court so as to restrain illegal acts of Justices of the Peace (*n*).

Section 35 of the Seamen's Act, 1873, enabling the seaman to give evidence of the agreement without its being produced, although not under the heading of "mode of recovering wages" would, upon summary proceedings, no doubt be read in connection with the Act of 1882 as being *in pari materia*. Upon the provisions of that section we find decisions of the Courts of the Maritime Provinces. In a case before the Supreme Court of New Brunswick (*o*), taken up from the decision of the Magistrate of St. John, in which the plaintiff had proved an agreement at £3 per month, and claimed that it had terminated by deviation from the voyage, and had recovered judgment for £5, the Court (Parker, J.), said, "The seaman may sue in a magis-

(*m*) *Marshall on Stats.* p. 27, and *Potter's Dwarries*, 191, n.

(*n*) *The Canadienne*, 6 Q. L. R. 91 (1880).

(*o*) *Hayward v. Maine*, 1 Kerr 292. See also the *Tug Robb* (*supra*).

trate's court without specially declaring on the contract," and gave judgment for the plaintiff with costs, observing that, "If the case were sent down to the Justice again he would be bound to decide in that way." In another case (p) before the same Court on a *certiorari* to quash the order of a Justice of the Peace for payment of £9 5s., seaman's wages, and £4 costs of prosecution, it was held that the Justice of the Peace had jurisdiction, and that the seaman might give evidence of the agreement without producing articles of agreement.

In a case in the Vice-Admiralty Court of Quebec (q), in which no articles were produced and the plaintiff obtained judgment, the learned Judge remarked that it might have been before a Justice of the Peace, under 5 & 6 Wm. IV. cap. 19, sec. 15, the amount being under £50, viz., \$90.

Foreign Ships.—The seaman who has signed articles is bound by the law of the flag, and upon protest of the consul of the foreign country to which the ship belongs proceedings may be stayed (r). The Vice-Admiralty Court at the instance of the consul of the foreign country to which the ship belonged declined to proceed (s).

Section 27 of the Seamen's Act, 1873, would seem to be *in pari materia* with those sections relating to the mode of recovering wages, which provides that no Justice of the Peace shall entertain or act upon any complaint or information under that Act, by or against any person belonging to any foreign merchant ship and not being a subject of Her Majesty, without the consent of both parties or the consent in writing of the consul, vice-consul or commercial or other duly accredited agent of the country to which the ship belongs except in pursuance of treaty stipulations. Where the suit is in the Maritime Court against a foreign ship, the rules of Court provide for the service of notice of the institution of the suit upon the consul of the country to which she belongs. The same practice prevails in Eng-

(p) *Regina v. Wheten*, 3 Allen 270.

(q) *The Agnes*, Stuart 56.

(r) *The Nina*, 37 L. J. Ad. 17; *The Leon XIII.*, 8 P. D. 121; 52 L. J. P. 58.

(s) *The Bridgewater*, 7 Q. L. R. 346 (1881).

land (*t*) and in the Vice-Admiralty Courts (*u*). But where the consul before entering a protest against the proceedings signed a bond for release of the vessel, submitting to the jurisdiction of the Court, the protest was overruled (*v*).

The order of a Justice of the Peace or Stipendiary Magistrate directing payment of wages may be enforced against the owner by distress on the ship, the tackle, and apparel thereof (*w*).

Whether the case be one for the summary remedy, or one within the jurisdiction of the Maritime Court, if articles of agreement have been entered into by the master with the crew, as he is required under a penalty to do (*x*), and such articles be produced and proved upon the trial, they will govern the rights of the parties (*y*), but where the meaning or construction of the contract admits of doubt, the court will give the seaman the benefit of the doubt (*z*). For the inland waters the form of the articles is prescribed by "The Seamen's Agreement Act, 1875," the first sentence in the preamble of which is that "The Seamen's Act, 1873," does not apply to the inland waters of the Dominion. And after further reciting, amongst other things, that it was expedient that masters of certain British ships navigating the inland waters, not required to enter into agreements with their crews, should be required to enter into such agreements, the Act goes on to provide for such agreements, and defines (sec. 2) the class of vessels which are to be subject to such provisions, viz.:—

Ships registered in Canada, propelled by steam, and of more than 20 tons registered tonnage; —
propelled otherwise than by steam, and of more than 50 tons registered tonnage; —
employed in navigating the inland waters of Canada, above the harbour of Quebec.
Barges and scows navigating rivers and canals being excluded from its operation.

(*t*) Roscoe, 39.

(*u*) *The Monark*, 9 Q. L. R. 211.

(*v*) *Ibid.*

(*w*) Roscoe, 79, 80, and *The Seamen's Act*, 1878, sec. 55.

(*x*) 38 Vict. cap. 29, sec. 5.

(*y*) Boyd 153-4.

(*z*) *The Hoghton*, 3 Hagg. Ad. 112.

Certain of the forms prescribed for the merchant shipping trade of the United Kingdom as to agreements with seamen and other matters, set forth in the appendix to the Merchant Shipping Act, 1854, have been adapted to the Canadian shipping of the Maritime Provinces by the Seamen's Act, 1878, with slight modification; but the only form adapted to the inland waters, by the Act of 1875, is "The Form of Agreement, or Articles for a Canadian ship subject to this Act." It differs from those from which it is taken in the omission of the column as to wages advanced on entry, the column for the amount of the monthly allotment, the scale of provisions for the crew, the appended regulations as to discipline, and in some other particulars. The agreement must be made and signed in presence of a respectable witness or a shipping master, or a chief officer of customs, who is to attest each signature on such agreement; and any seaman who has signed any such agreement may, at termination of his engagement, if the master thinks fit, be discharged before any shipping master or chief officer of customs; and at any period during any such engagement, and before its termination the master may discharge any such seaman on payment of his wages and with his consent; and such discharge may be made, if the master thinks fit, before any shipping master or chief officer of customs in Canada (a). And in cases of ships making short voyages, running agreements may be made with the crew, which may be made to extend over two or more voyages, or for a specified time, not beyond eight months (b).

ALFRED HOWELL.

(a) *Ibid.* sec. 3.

(b) *Ibid.* sec. 4.

AIDING AND INDUCING THE COMMISSION OF CRIME.

Recent events have revived interest in this subject, which has been discussed in 15 Ir. L. T. 395, 410, 583, and 25 Alb. L. J. 184.

A distinction must be made between aiding or furnishing opportunities for the completion of a contemplated crime, and the direct inducement of a crime. In the first case there is the mere laying of a trap; in the second, there is participation. And in either case the combination of circumstances may be such that, though the act, with the aid afforded, becomes complete, there is no crime. A few cases will illustrate the distinctions, which, however, are not as clear as they should be.

It has never been held unlawful to lay a trap to catch a person who had already committed an offence, or who was contemplating one, and had formed the guilty intent. In *R. v. Williams (a)*, overtures were made by a person to a servant to induce him to join in robbing his master. The servant told his master, and the latter directed him to call on the prisoner, and renew the connexion with him, which he did. The master then marked a coin, and it was placed on the counter from which the prisoner took it. Held, that it was larceny.

In *R. v. Headge (b)*, a shopkeeper suspected his clerk of putting money received for sales into his pocket instead of into the till. He accordingly gave some marked coins to a friend, and requested him to come to the shop and make a purchase, giving the marked coins in payment. This was done. Immediately afterwards the master examined the till, and not finding the coins therein, had the clerk

(a) 1 C. & K. 195.

(b) 2 Leach 1033.

arrested. The marked coins were found upon his person. Held, that it was embezzlement.

In *R. v. Bannen* (c), A. gave directions to a die-sinker to make some dies resembling a shilling, alleging that they were for use in a whist club. The die-sinker notified the officers of the mint, who told him to go on and execute the order, which he did. Held, that A. was guilty of felony as a principal.

R. v. Young (d), and *R. v. Rathbone* (e), may also be referred to. These were both cases of decoy letters. Coins were placed in letters, which were dropped in the post office, to test the honesty of suspected clerks. They were stolen, and the prisoners convicted of stealing "post letters." In the first case Lord Denman, C.J., said, "What can be a more legitimate purpose than for a superior officer to test the honesty of a person who is employed under him?"

In order to make the trap effective great care must be observed, as will be seen from two cases which we now cite. In *R. v. Johnson* (f), a servant pretended to concur with two persons who proposed to unite with him in robbing his master's house. In the master's absence the servant made an arrangement for these persons to enter. He lifted the latch and let one in who, before he had taken anything, was seized by an officer stationed for that purpose. The servant then brought the second person, who was caught in the house with a basket of plate in his hand. Held, that they were not guilty of burglary; but the one who had the plate was held guilty of stealing in a dwelling house, and the other of being an accessory before the fact. In *R. v. Lawrance* (g), the prisoner requested a clerk to steal a deed belonging to his master. By the direction of the master, the clerk took the deed for the purpose of enabling the prisoner to steal it. It was held, that if the clerk handed it to the prisoner there was no

(c) 1 C. & K. 295.

(d) 2 C. & K. 466.

(e) C. & M. 220.

(f) C. & M. 218.

(g) 4 Cox C. C. 438.

larceny; but if he placed it where it could be stolen, and it was taken, that would be larceny.

We have now a class of cases in which the consent of the prosecutor to the commission of the act defeats his object, viz., that of procuring the completion of the crime and the punishment of the offenders, by taking away from it the essentials of crime. For instance, in *R. v. Egginton* (*h*) where a servant opened the house for expected burglars, it was held, as in *R. v. Johnson* (*supra*), that there was no burglary.

So in *People v. Collins* (*i*), the prisoner requested one Parnell to enter a building in the night time and steal some money which he knew was concealed there, and divide it between them. Parnell informed the sheriff who told him to accept the proposition and carry out the enterprise with a view to apprehending the prisoner. The building was entered by Parnell, who took the money and delivered it to the prisoner, who was immediately arrested. The Supreme Court of California said, "If Parnell entered the building and took the money with no intention to steal it, but only in pursuance of a previously arranged plan between him and the sheriff, intended solely to entrap the defendant into the apparent commission of a crime, it is clear that no burglary was committed, there being no felonious intent in entering the building, or taking the money. If the act of Parnell amounted to burglary, the sheriff who counselled and advised it was privy to the offence, but no one would seriously contend, on the foregoing facts, that the sheriff was guilty of burglary. The evidence for the prosecution showed that no burglary was committed by Parnell, for the want of a felonious intent, and the defendant could not have been privy to a burglary, unless one was committed."

In *R. v. Hancock and Baker* (*j*), the facts were these. Hancock was leaving work in the evening and was seen by his master to take a cigar from a shelf in the shop. He was immediately stopped, and a detective sent for.

(*h*) 2 B. & P. 509.

(*i*) 18 Alb. L. J. 271.

(*j*) 38 L. T. N. S. 787.

The master had previously missed cigars from his shop. The detective took the cigar from the prisoner, Hancock, marked it, and gave it back to him, with five others furnished by the master, and gave him instructions as to what he should do. Hancock then went to Baker and either gave or sold him the cigars. The detective followed him and arrested Baker, telling him he had incited Hancock to steal from his master. Baker gave up the cigars immediately. Hancock pleaded guilty, and deposed that Baker had encouraged him to steal as many cigars as he could for him. The prisoners were convicted, but Cockburn, C. J., and Huddleston, B., quashed the conviction, following *R. v. Dolan* (k). Cockburn, C.J., said, "At the time the cigar was received by the prisoner it had been reduced into the possession of the master or if you please, of the police, and Baker was then employed as an instrument to detect Hancock." (The names are transposed in the report). For the prosecution it was argued that when the cigar was taken from the prisoner by the police it was in the custody of the law, and the policeman was not bound to restore it to the master, and the master gave no authority to the policeman to act as he did. Cockburn, C.J., said, "Who gave the other five cigars to the policeman to give him?"

In *R. v. Dolan*, supra, it was argued that the master, in a similar case, was the agent of the police. But Lord Campbell, C.J., said, "Turner, the owner, had the possession of the goods just as much as if he had taken them into his own hands and had delivered them from his own possession to another person for a particular purpose. He was the bailor of the goods subsequently to the theft, and the other person was the bailee. After that the goods are carried by Rogers, by the direction of the master of the goods, to the prisoner who receives them. This is not a receiving of stolen goods within the meaning of the Act of Parliament." And Coleridge, J., said, "The policeman detained the goods in his possession for the purpose of the law; but it is evident, from the facts of the case, that the master retained his

(k) Dears. 436.

control over them, for he again interposes and what is done afterwards is done by his authority. I think it ought to be taken that they remained under the control of the owner, and if I am right in that conclusion, the interference of the policeman is immaterial and the conviction was wrong." And Williams, J., said, "In order to make out a felonious receipt it must be a receipt without the authority of the owner of the goods."

A case similar in principle is *R. v. McDaniel* (l), where Salmon and others conspired to procure two persons to rob Salmon on the highway, in order that the conspirators might obtain a reward offered for the apprehension of such offenders. Salmon accordingly put himself in position to be robbed, and the victims duly robbed him according to appointment. It was, however, held that there was no offence committed, inasmuch as the act was done with Salmon's consent and by his procurement. So Wharton says (m) that if the prosecutor implicitly permits the prisoner to write his name, this is not forgery.

In *U. S. v. Whittier* (n), Dillon, J., referring to the *ratio decidendi* of *R. v. McDaniel* said, "But this principle must be limited to the cases where the consent will, as a matter of law, neutralize the otherwise criminal quality of the act."

Following up the dictum of Dillon, J., to its natural consequences, we are led to the consideration of offences against the person. In several classes of such offences the consent of the injured person takes away every element of crime in the aggressor, and it is therefore questionable whether it is possible to bring such cases within the principle of the cases cited at the beginning of this article; for it would be impossible to lay a trap for the aggressor without the consent of the injured person, which consent once given removes from the act every element of crime. For instance, the crime of rape must be committed against the will, or, at least without the consent, of the prosecutrix.

(l) *Fost.* 121.

(m) *Cr. Law*, sec. 149.

(n) 5 *Dill.* at p. 41.

As to this phase of the subject Mr. Wharton says (o), "It is also to be noticed that in cases in which, as in rape and larceny, the act to be indictable must be against the prosecutrix's will, when the prosecutor, by such inveigling *consents* to the act, these particular forms of prosecution cannot be maintained. But when the offence is against the *public*, and is independent of the question of the prosecutor's consent, as in riot, treason, and nuisance, then although the inveigler may make himself criminally responsible (in felonies as accessory before the fact, in misdemeanors as principal) yet this does not relieve the person inveigled from penal responsibility. Hence, in revenue prosecutions, and in prosecutions for other public misconduct, it is no defence that the defendant, having previously contemplated a violation of law, is led to the particular wrong by a decoy."

Though in the early cases traps and devices for securing the apprehension of offenders have been looked upon as lawful, latterly they have been severely commented upon, and in one case, at least, the conviction was quashed. We refer to *Blaikie v. Linton* (p) mentioned in a short article in the *Law Times*, reprinted in 15 Ir. L. T. 410. In this case a female turnkey had bought liquor from the accused, contrary to the terms of his license, and the conviction was quashed. In the American case of *U. S. v. Whittier*, supra, Treat, J., said, "The sense of indignation against such vocation or conduct should not permit a violation by the Courts of established rules of law, or an unlawful exercise of jurisdiction; nor the countenance of unlawful contrivances to induce or manufacture crime. * * It must be conceded that contrivances to induce crime (the contriver confederating for the purpose with the criminal) are most rigidly scrutinized by the Courts, even when the contrivances are lawful in themselves. But when the contrivances are of an unlawful character, should Courts not be even more strict? * * No Court should, even to aid in

(o) Sec. 149.

(p) 18 Scott. Law Rep. 583.

detecting a supposed offender, lend its countenance to a violation of positive law or to contrivances for inducing a person to commit a crime. Although a violation of law by one person in order to detect an offender will not excuse the latter, or be available to him as a defence, yet resort to unlawful means is not to be encouraged. When the guilty intent to commit has been formed, any one may furnish opportunities, or even lend assistance, to the criminal, with the commendable purpose of exposing and punishing him. But no case has been found which goes beyond these views. There are legitimate means and jurisdictions where offences can be tried and punished, and the public weal is best subserved where rigid adherence thereto is enforced." Much more emphatic, and as we venture to say, much more in the spirit of our law, is the utterance of a Michigan Court in *Saunders v. People* (q).

In that case a person desired to steal from a Court House some valuable papers. He requested the officer in charge to leave the door unlocked, which he did after consultation with his superior officer. The accused fell into the trap and was apprehended. The Court said, "Where a person contemplating the commission of an offence approaches an officer of the law, and asks his assistance, it would seem to be the duty of the latter, according to the plainest principles of duty and justice, to decline to render such assistance, and to take such steps as would be likely to prevent the commission of the offence, and tend to the elevation and improvement of the would-be criminal, rather than to his further debasement. Some Courts have gone a great way in giving encouragement to detectives in some very questionable methods adopted by them to discover the guilt of criminals; but they have not yet gone so far, and I trust never will, as to lend aid and encouragement to officers who may, under a mistaken sense of duty, encourage and assist parties to commit crime, in order that they may arrest and have them punished for so doing. The mere fact that the person contem-

plating the commission of a crime is supposed to be an old offender can be no excuse, much less a justification for the course adopted and pursued in this case. If such were the facts, then the greater reason would seem to exist why he should not be actively assisted and encouraged in the commission of a new offence, which could in no way lead to throw light upon his past iniquities, or aid in punishing him therefor, as the law does not contemplate or allow the conviction and punishment of parties on account of their general bad, or criminal conduct, irrespective of their guilt or innocence of the particular offence charged, and for which they are being tried. Human nature is frail enough at best, and requires no encouragement in wrong-doing. If we cannot assist another, and prevent him from violating the laws of the land, we should at least abstain from any active efforts in the way of leading him into temptation. Desire to commit crime and opportunities for the commission thereof would seem sufficiently general and numerous, and no special efforts would seem necessary in the way of encouragement or assistance in that direction. * * Assuming that there is not in the record full evidence of such an invitation to enter the clerk's office as would conclusively show there was no breaking; the encouragement of criminals to induce them to commit crimes in order to get up a prosecution against them is scandalous and reprehensible."

EDITORIAL REVIEW.

Constitutional Law.

We are promised a work on the British North America Act by Mr. Travis of the New Brunswick Bar. There is a grand field here for a man of talent, and we hope Mr. Travis may succeed in elucidating some of the intricate questions of constitutional law that are our heritage.

In the House of Commons the leader of the Opposition, in discussing the railway policy of the present Government, went as far as to propose a revision of the constitution. One of the grounds was that seventeen years' working of the present Act had disclosed a sufficient number of defects to warrant it. We have had a number of constitutional changes since Canada was ceded to Great Britain, but most of our Constitutional Acts have been longer lived than the British North America Act. If we are to have a revision of the constitution every seventeen years, we might almost as well have our statutes made by the Imperial Parliament. The British North America Act was intended to inaugurate and perpetuate union—not to perpetuate disintegration and provincial independence. In order to carry out the scheme, the balance of power has by the Act in every case been turned in favour of Canada. Because the reserve powers are found not to be with the Provinces, revision is talked of.

If a revision be had, however, it would be well to place the Legislatures under some unmistakeable limitation of power. The power to destroy vested rights and to impair the obligations of contracts, which the Courts have held belongs to our law-making bodies, is a most dangerous one, and most dangerously used. Hardly a session passes that a book full of laws is not presented to us which hamper in some way or other the actions of parties to fair and hon-

ourable contracts. But lately a case has arisen, in which the arrangement of the Canada Southern Railway Company with its creditors by means of an Act of the Parliament of Canada, has come up for consideration in the Supreme Court of the United States. That Court held that Parliament was supreme, and under no limitation of power to deal as it pleased with public and private affairs : *Canada Southern R. Co. v. Gebhard*, 17 Rep. 225. As to this, the *American Law Review* says, "American investors will carefully note this decision. It means that contracts which may be made in Canada are subject to be vacated at any time by the Legislature of that country. It is, of course, to be presumed that that Legislature will not exercise its discretion oppressively, and that it will exercise it only when its exercise is called for in a case of strong or overwhelming necessity ; but the very existence of the power is sufficient to alarm capital and to prevent capitalists from investing their money in Canadian enterprises, when they can find investments equally good in a country where the Legislature does not possess the power of uprooting and sponging out private contracts."

The Late Chief Justice Spragge.

In the short existence of this Journal we have been called upon to chronicle the deaths of two Chief Justices of Ontario.

During the past month the Honourable John Godfrey Spragge, Chief Justice of Ontario, died after a brief illness. In our last number may be found notes of judgments of the Court of Appeal in which he took part. To the end he retained clearness and freshness of mental vision, and great vigour of body for a man of his age. Though not a great lawyer his judgments always commanded the respect of both Bench and Bar.

He is mourned not only by the profession of which he was an eminent and dignified member, but by the Church of England, in Ontario, of which he was a staunch adherent.

Wanted—Addenda and Corrigenda.

The *Canada Law Journal* takes exception to our criticism of Mr. Holmsted's last work, and takes occasion to say, "To our feeble intellects a long list of addenda and corrigenda appended to a book is an indication of two things—industry and honesty."

We have looked through half a dozen of the later volumes of the *Canada Law Journal*, but have failed to find in them either of these things—that is, addenda or corrigenda.

Administration of Justice in Manitoba.

The House having voted the salary for another Judge in Manitoba, we presume the appointment will soon be made. We understand that there are any number of gentlemen of the Bar in that Province ready to sacrifice themselves for their country, and to accept a salary much below the alleged average income of a Manitoba practitioner. A seat on the Bench is evidently now regarded as a "corner lot" amongst our brethren of the Prairie Province.

BOOK REVIEWS.

Principles of the Criminal Law. A concise exposition of the nature of crime, the various offences punishable by the English Law, the law of criminal procedure, and the law of summary convictions; with table of offences, their punishments and statutes, tables of cases, statutes, etc. By SKYMOUR F. HARRIS, B.C.L., M.A. (Oxon). Third edition. Revised by the AUTHOR and AVIET AGABEG, of the Inner Temple, and of the Northern Circuit, Barrister-at-Law. London: Stephens & Haynes. 1884.

This book should be welcome to all students and to all practitioners. It is orderly in its arrangement, intelligent in its method, and clear and concise in its language. We give, as an instance, a short paragraph, in which a very popular error is exposed, corrected, and the reason for the correction given in fewer words than we have made use of to describe it. "If the criminal survives, he must be hanged again, inasmuch as the sentence is that he be hanged by the neck till he is dead."

For ready reference, the book excels all others, being more convenient than Russell on Crimes, though perhaps not its equal in all respects.

A Manual of the Law of Real Property. Including also general rules of law relating to the purchase and sale of real property, or the law of vendor and purchaser, as determined by the leading Courts of England and the United States. By CHARLES T. BOONE, LL.B., Author of "Law of Corporations," etc. San Francisco: Sumner, Whitney & Co. 1883.

The Law of Marriage and Divorce, as established in England and the United States. By DAVID STEWART, of the Baltimore Bar, joint author of Stewart & Carey's "Law of Husband and Wife in Maryland." San Francisco: Sumner, Whitney & Co. 1884.

The Law of Parties to Actions, Legal and Equitable. By HORACE HAWES, Counsellor-at-Law. San Francisco: Sumner, Whitney & Co. 1884.

We group these publications together because of their uniform style. They are small, compact volumes, containing volumes of law. The effort of each author appears to be to crowd into each chapter as many bald statements of the law on the subject as possible. There is no elaboration of an idea, no demonstration of a proposition, but a bare enunciation of proposition after proposition. And if you doubt the truth of any one of them you may look at the cases to which you are referred at the end of each paragraph. Perhaps the best description that can be given of the style is to say that the books are composed of a succession of condensed head-notes. At any rate they bear about the same relation to more elaborate treatises, that a head-note does to its judgment.

The same notion of condensation has been carried out by the printer and binder, so that a man might, without very great inconvenience, carry a very respectable library about with him on his person.

RULES OF THE SUPREME COURT OF JUDICATURE, ONTARIO.

In our last regular number, ante p. 176, we printed two new rules of the Supreme Court of Judicature. Since these were published two new editions have been issued. Rule 545 has an important exception appended to it which was omitted from the copy furnished to us. There seems also to be some confusion about the numbers of the new rules. According to the last edition the rules which are printed at page 71, ante, are properly numbered 539 and 540 respectively. The rules at page 176, ante, may be omitted, as we now re-print them with their proper numbers, and with a correction in the latter of the two, and with one that escaped our notice before.

Passed Saturday, 15th March, 1884.

541. (a) The Master in Ordinary shall have the same power, authority and jurisdiction as the Master in Chambers in respect of all causes and matters referred to him or which may arise in his office.

(b) Any official Referee upon the request of the Master in Ordinary, or of a Judge of the High Court may sit with or for the Master; and while sitting for him shall have all the authority and power of such Master, but shall not be entitled to any fees.

542. Ordered that Rule 324 (a) be rescinded and the following substituted therefor:—"Upon hearing of such motion the Court may grant the application on such terms and conditions as may be thought proper, or may refuse the same; or instead of either granting or refusing the same may give such directions for the examination of either parties or witnesses or for the making of further inquiries or with respect to the further prosecution of the suit as the

circumstances of the case may require; and upon such terms as to costs as the Court thinks right.

548. In actions in the High Court of Justice no reference to arbitration or other reference, or examination for the purpose of discovery or examination of a judgment debtor on which fees may be payable otherwise than in law stamps, shall be taken before the Judge of the County Court or Local Judge of the High Court, or Local Master being also a Judge of the County Court, by whom the order for such reference or examination has been made. References in administration matters under General Order 638 of the Court of Chancery, and in partition matters under General Order 648 of the Court of Chancery; and other like references in mortgage actions are excepted from the operation of this Rule.

544. This rule makes various minor alterations in the tariff, which have already been made known to the profession.

REVIEW OF EXCHANGES.

American Law Register.—December, 1883.

Some Points of Comparison Between English and American Legislation as to Married Women's Property, by CHARLES CHAUNCEY SAVAGE. The late English Statutes respecting married women's property are noticed, and some decisions are cited.

Ibid.—January, 1884.

Contracts for the Benefit of Third Persons, by JNO. HOUSTON MERRILL. Where the principal object of the contract between the promisor and the promisee is a benefit to the third person he may sue upon it. But the interest of the third person must be exclusive to entitle him to recover. The law of agency is sometimes invoked in aid of the third party. "It is said that the promisor is the agent of the third person whose act the latter can ratify, whereas directly the reverse of this is true. The promisor is the agent of the promisee, if of any body. The assets in his hands are the property of the promisee and subject to his control; their loss would not fall upon the third person." Again, the law of suretyship has been relied on. Where the facts warrant an inference that the promisee, by his contract with the promisor, became the surety of the latter, the promisor is liable to the third person. "Even here, however," says the learned writer, "the effect is to make a contract for the parties different from that which they intended. * * The promisor agrees with the promisee to pay the debt, and thereby, as between themselves, becomes the principal debtor. But the promisee not being discharged, is also liable to the third person. If compelled to pay he is a surety only in this, that he has a right to call upon the promisor to indemnify him. * * If the promisee is a surety for the promisor, who has assumed payment of the debt, then failing to recover from the promisor, the third person has a recourse over against the promisee who would thus be compelled to pay this debt twice." Novation. Where, in the contract between them, the promisor assumes the promisee's debt, he becomes liable by substitution or novation. When property is conveyed, subject to a mortgage which is assumed by the grantee, the mortgagee can recover from the purchaser. "Three essential elements of a novation are wanting, 1st. A contract drawn up in accordance with the intention of the parties. 2nd. The consent of the mortgagee to accept the promisor as his debtor. 3rd. The discharge of the original debtor." Where one of two partners assumes the payment of firm debts as part of the consideration of a contract with the retiring parties, firm creditors may not sue the obligors on the partner's

bond. Where by the contract between the promisor and the promisee, the former becomes a trustee for the third person, the latter can recover where the circumstances warrant an inference either (a) that the third person accepts the promisor as his trustee, or, (b) that a bargain, more or less direct, has been entered into between the third person and the promisor. Where a promisor as part of the consideration assumes a debt of the promisee to a third person the action will lie. Many American cases are cited.

Ibid.—February, 1884.

State Legislation Regulating Railroad Traffic, by CHARLES CHAUNCEY SAVAGE. The right of States to regulate rates of fare and freight is discussed, and the methods of so doing are shown.

Irish Law Times.—21st July, 1883.

User of Dangerous Instrumentalities for the Protection of Property, continued and concluded in two following numbers. As a general rule the person using such instruments is responsible for injuries occasioned thereby. Numerous cases are cited.

Ibid.—11th August, 1883.

The Right to the Custody of Children, continued and concluded in five following numbers. The law respecting the custody of illegitimate children is discussed. It is said that though the mother of an illegitimate infant has a paramount claim to its custody, not merely as against strangers, but even as against the father, it seems questionable on the authorities whether such a claim could be maintained either by father or mother as a matter of right. This is the view taken in *Re Brandon*, 7 P. R. 347, where it was said to be in the discretion of the Court to decide who shall have the custody. The right of the father to his legitimate children is discussed. In *Besant v. Wood*, L. R. 12 Chy. Div. 605, Jessel, M.R., said that a father "has not either in law or equity the power to abrogate his parental functions, and say that the custody of children shall be given to his wife;" James, L.J., said, in *Re Besant*, L.R. 11 Chy. Div. 508, "no such substitution or delegation (to the mother, of the father's rights and powers in respect of his children) is possible by our law." In *Roberts v. Hall*, 1 Ont. R. 388, a distinction was pointed out between an executory and an executed contract. Though the Court could not decree specific performance of a contract by a father to part with his child, yet where he had done so in consideration of a benefit to be subsequently given to the child, it was held that the child could recover that benefit by suit. Numerous cases are cited.

Ibid.—29th September, 1883.

Imitating and Counterfeiting Current Coin. Some recent English and American cases are cited.

THE CANADIAN LAW TIMES.

OCCASIONAL NOTES.

Supreme Court of Canada.

ONTARIO.]

GRASETT v. CARTER.

Boundary line—Equitable estoppel—Description of land by reference to plan—Construction of deed—Extrinsic evidence of boundaries—Conflicting evidence—Duty of Appellate Court.

T. was the owner of lot nine, and C. the owner of lot eight adjoining it on the south. Both lots had formerly belonged to one person, and there was no exact indication of the true boundary line between them. T., being about to build, employed a surveyor to ascertain the boundary. The surveyor went to the place, and asked C. where he claimed that his northern boundary lay. C. pointed out an old fence, running part of the way across the land between the lots, and an old post, and said the line of the fence produced to the post was his boundary line. The surveyor then took the average line of the fence and produced it till it met the post. He staked out this line, C. not objecting. A few days afterwards, T., with his architect and builder, went on the ground, and, in the presence of C., the builder again marked out the boundary by means of a line connecting the surveyor's marks, C. not objecting. Excavating was commenced according to that line immediately, and T.'s house was built according to the line on the extreme verge of T.'s land. The first time that C. raised any objection to the boundary so marked was when the walls of T.'s house were up and ready for the roof.

Held, that C. was estopped from disputing that the line run by the surveyor, according to which money had been expended in building, was the true line.

Reversing the judgment of the Court of Appeal.

Per Strong, J. When lands are described by reference to a plan, the plan is considered as incorporated with the deed, and the boundaries of the land conveyed as defined by the plan are to be taken as part of the description.

In construing a deed of land not subject to special statutory regulations, extrinsic evidence of monuments and actual boundary marks is inadmissible to control the deed, but if reference is made by the deed to such monuments and boundaries, they may be given in evidence and control the description, though they may call for courses, distances, etc., which do not agree with those in the deed.

In 1831, W. D. P., who owned a piece of land, bounded on the south by Queen street, on the east by William street, on the west by Dummer street, and running north some distance, laid out the southerly portion into lots, depicted upon a plan, which plan showed the boundary line between the plaintiff's and the defendant's lots to be exactly 600 feet from Queen street. There were no stakes or other marks on the ground to indicate the boundaries of the lots or the extent of the land so laid out. Many years afterwards, the remaining land to the north of the parcels so laid out was laid out into lots, depicted on another plan, and a street was shown between the northerly limit of the first plan and the southerly limit of the second plan. The actual distance, however, of this street from Queen street was greater than the first plan on its face showed it to be, and the parties owning lots on the first plan appeared to have taken up their lots as if Queen street and the street at the north of the first plan were the actual limits of the plan.

Per Strong, J. (i) The true boundary line between the plaintiff's and defendant's lots was a line commencing at a point 600 feet from Queen street, as measured on the ground at the time when the plan was made; but in the absence of evidence showing that a measurement at that time would be the same as a measurement on the levelled street, that point could not be accepted as the true point of commencement of the boundary line in question. (ii) Inasmuch as the conveyances to the parties were made according to the first plan, the second plan could not be invoked to aid in ascertaining the limits of the lots so conveyed.

Where there is a direct conflict of testimony, the finding of the Judge at the trial must be regarded as decisive, and should not be overturned in appeal by a Court which has not had the advantage of seeing the witnesses and observing their demeanor while under examination.

C. Robinson, Q.C., and E. Douglas Armour, for the appellant.

McMichael, Q.C., and A. Huskin, Q.C., for the respondent.

QUEBEC].

BERTHIER ELECTION CASE. GENEREUX v. CUTHBERT.

Dominion Controverted Election—Railway Pass—37 Vict. cap. 9, secs. 92, 96, 98 and 100—Questions of fact in appeal.

In appeal, four charges of bribery were relied upon, three of which were dismissed in the Court below, because there was not sufficient evidence

that the electors had been bribed by an agent of the candidate. The fourth charge was known as the Lamarche case. The facts were as follows: One L., the agent of C., the respondent, gave to certain electors employed on certain steamboats, tickets over the North Shore Railroad, to enable them to go without paying any fare from Montreal to Berthier, to vote at the Berthier election, the voters having accepted the tickets without any promise being exacted from or given by them. The tickets or passes showed on their face that they had been paid for, but there was evidence that L. had received them gratuitously from one of the officers of the Company.

The learned Judge, who tried the case, found as a fact that the tickets had not been paid for, and were given unconditionally, and therefore held it was not a corrupt act.

Held, (i) Fournier and Henry, JJ., dissenting, that the taking unconditionally and gratuitously of a voter to the poll by a railway company or an individual, whatever his occupation may be, or giving a voter a free pass over a railway, or by boat, or other conveyance, if unaccompanied by any conditions or stipulations that shall affect the voter's action in reference to the vote to be given, is not prohibited by 39 Vict. cap. 9 (D). (ii) That if a ticket, although given unconditionally to a voter by an agent of the candidate, has been paid for, then such a practice would be unlawful under section 96, and by virtue of section 98 a corrupt practice, and would avoid the election. (iii) Fournier, J., dissenting. That an appellate Court will not reverse the decision of the Judge who tried the case on a question of fact, without its being made apparent that his decision was clearly wrong.

Mercier, Q.C., for the appellant.

Lacoste, Q.C., for the respondent.

MEGANTIC ELECTION CASE.

COTE, *alias* FRECHETTE, v. COULET.

Dominion Controverted Election—Status of petitioners—Proof of—Corrupt practice by agent with knowledge of candidate—Disqualification—Short-hand notes.

At the trial of the petition, the returning officer, who was also the registrar of the County of Megantic, and secretary of the Municipality of Inverness, was called as a witness, and produced in Court in his official capacity the original list of electors for the township of Inverness, and proved that the name Laughlin McCurdy, one of the petitioners, whom he personally knew was on the list. The original document was retained by the witness, and, as neither of the parties requested that the list should be filed, the Judge made no order to that effect. The status of the other petitioners was proved in the same way.

Held, that there was sufficient evidence that the petitioners were persons who had a right to vote at the election to which the petition related under 37 Vict. cap. 10, sec. 7 (D).

The shorthand notes of the shorthand writer employed by the Court to take down the evidence were not extended in his handwriting, but were signed by him.

Held, that the notes of evidence could not be objected to.

Before setting out on a canvassing tour, the appellant, the sitting member, placed in the hands of one B., who was not his financial agent, \$100 to be used for the purposes of the election. While visiting a part of the county with which the appellant was not much acquainted, but with which B. was well acquainted, they paid an electioneering visit to one K., a leading man in that locality, who indicated to B. his dissatisfaction with the candidate of his party, and stated that, although he would vote for the Liberal party, he would not exert himself as much as in the former elections. The appellant then went outside, and B. asked his host, "Do you want any money for your church?" And having received a negative reply, added, "Do you want any money for anything?" K. then answered, "If you have any money to spare there is plenty of things we want it for. We are building a town hall, and we are scarce of money." B. then said, "Will \$25 do?" K. answered, "Whatever you like, it is nothing to me." The money was left on the table. Then, when bidding the appellant B. good-bye, K. said, "Gentlemen, remember that this money has no influence as far as I am concerned with regard to the election." The appellant did not at the time, nor at any subsequent time, repudiate the act of B. This amount of \$25 was not included in any account rendered by the appellant or his financial agent, and large sums were admittedly corruptly expended in the election by the agent of the appellant.

Held, affirming the judgment of the Court below, that the giving of the \$25 by B. to K. was not an act of liberality or charity, but a gift out of the appellant's money, with a view to influence a voter favourably to the appellant's candidature, and that, although the money was not given in appellant's presence, yet it was given with his knowledge, and therefore that the appellant had been personally guilty of a corrupt practice.

Crepeau, Q.C., and *Gormully*, for the appellant.

Irvine, Q.C., for the respondent.

BRITISH COLUMBIA.]

SEWELL v. THE BRITISH COLUMBIA TOWING CO. ET AL.

Contract of towage—Liability under—Sea damage—Joinder of defendants—Right of a saw-mill company to let to hire a steam-tug—Liability limited—25 & 26 Vict. cap. 63 (Imp.)—31 Vict. cap. 53, sec. 12—Motion for judgment—Findings of jury not against weight of evidence.

The B. C. T. Co. entered into a contract of towage with the plaintiffs to tow their ship *Thrasher* from Royal Roads to Nanaimo, there to load with coal, and when loaded to tow her back to sea. After the ship was towed to Nanaimo, under arrangement between the B. C. T. Co. and the M. S.

B. Co., the remainder of the engagement was undertaken between the two Companies, and the M. S. Co.'s tug, *Etta White*, and the B. C. T. Co.'s tug, *Beaver*, proceeded to tow the *Thrasher* out of Nanaimo on her way to sea, the *Etta White* being the foremost tug. Whilst thus in tow the ship was dragged on a reef and became a complete wreck. The night of the accident was light and clear, the tugs did not steer according to the course prescribed by the charts and sailing directions, there was on the other side of the course they were steering upwards of ten miles of open sea free from all dangers of navigation, and the ship was lost at a spot which was plainly indicated by the sailing directions, although there was evidence that the reef was unknown. The ship had no pilot, and those on board were strangers to the coast. In an action of damages for negligently towing the plaintiffs' ship and so causing her destruction,

Held, (i) that as the tugs had not observed those proper and reasonable precautions, in adopting and keeping the course to steer, which a prudent navigator would have observed, and the accident was the result of their omission so to do, the owners of the tugs were liable. (ii) That under the British Columbia Judicature Act the action was maintainable in its present form by joining both Companies as defendants. (iii) That as there was nothing in the M. S. Co.'s charter or act of incorporation to prevent their purchasing and owning a steam-tug, and as the use of such a vessel was incidental to their business, they had a perfect right to let the tug to hire for such purposes as it was used in the present case. (iv) That as the tugs in question were not registered as British ships at the time of the accident, their owners were not entitled to have their liability limited under 25 & 26 Vict. cap. 63 (Imp.). (v) That the limited liability under section 12 of 31 Vict. cap. 58 (D) does not apply to cases other than those of collision.

This case came before the Court below on motion for judgment, under the order which governs the practice in such cases, and which is identical with the English Order 40, Rule 10 of the rules of 1875. This enables the Court to give judgment finally, determining all questions in dispute, although the jury may not have found on them all, but does not enable the Court to dispose of a case contrary to the finding of a jury. In case the Court consider a particular finding to be against evidence all that can be done is to award a new trial, either generally or partially, under the powers conferred by the rule similar to the English Order 39, Rule 40.

This Supreme Court giving the judgment that the Court below ought to have given, is therefore in this case in a position to give judgment upon the evidence at large, there being no findings by the jury interposing any obstacle to their so doing.

Per Taschereau, J. The B. C. T. Co. alone were liable for the damage.

Davie and *McIntyre*, for the appellants.

Benjamin, for the respondents.

ONTARIO.

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High Court of Justice.
QUEEN'S BENCH DIVISION.

[ROSE, J., 17TH APRIL, 1884.]

In re HERRING & NAPANEE TAMWORTH & QUEBEC RAIL-
WAY CO.

*Consolidated Railway Act—Notices appointing arbitrators—Making same
rule of Court—Award, validity of.*

The Railway Company served a notice on H., under 42 Vict. cap. 9 (D.), offering a sum of money as compensation for land to be expropriated by them, and naming an arbitrator. H. served a notice on the Company, naming his arbitrator, and the two appointed a third.

Held, that the notices of appointment of arbitrators and the appointment of the third arbitrator might be made a rule of Court under the C. L. P. Act, sec. 201.

After the evidence had been closed, the construction committee of the Railway Company wrote a letter addressed to H., agreeing to certain things whereby the damage to his property would be lessened. This was delivered to the arbitrator appointed by the Company before the award was made, and by him to the umpire. The award contained recitals of the benefits proposed by this letter, and assessed the compensation at the sum originally offered by the Company. This letter was not communicated to H. till after the award had been made. It also appeared that the Company's arbitrator and the umpire consulted with the Company's counsel before making the award. The award was not signed by H.'s arbitrator.

Held, bad, though the arbitrators swore that the letter had not influenced them in making their award.

Langton, for the motion.

Cassels, Q.C., contra.

[19TH APRIL, 1884.]

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REGINA v. YOUNG.

*Liquor License Act—Conviction—Two offences—One penalty—Locality of
offence.*

The defendant was convicted under section 51 of the Liquor License Act of selling liquor without a license, and, under section 46, of allowing

liquor sold by him to be consumed on the premises, and one penalty was inflicted for his offences.

Held, bad, in not showing for which offence the penalty was imposed.

Held, that it was bad also in not showing the place where the offence was committed.

Mackenzie, Q.C., for the motion.

Delamere, contra.

[21ST APRIL, 1884.]

REGINA v. RODWELL.

Liquor License Act—Conviction—Second and third offences—Locality of the offence—Punishment.

Convictions imposing the increased penalties for second and third offences, under the Liquor License Act, R. S. O. cap. 181, sec. 52, are bad, unless proceedings have been taken for the first offence.

In proceedings for selling liquor on Sundays, it was not shown that the defendant had a license, or that the place in which the liquor was sold was one where intoxicating liquors were or might be sold by wholesale or retail, pursuant to section 43 of the Act.

Held, that the conviction was bad.

Held, also, that the punishment for offences against section 43 must be either imprisonment with hard labour, or a fine; and in the event of non-payment, or non-recovery, of a fine under section 59, then imprisonment without hard labour.

Mackenzie, Q.C., for the motion.

Delamere, contra.

CHANCERY DIVISION.

[BOYD, C., 9TH MARCH, 1884.]

In re LAIRD & PATON.

Vendor and purchaser—Tax title—Contract to be completed on tax title becoming indefeasible.

The vendor agreed to sell a piece of land to which he claimed title by a tax deed, the contract to be completed when the tax sale became indefeasible by lapse of time. In the meantime the vendor procured a release from the owner previous to the tax sale, and the title was investigated by the purchaser and rejected.

Held, that the parties were remitted to their original position under the contract, which was to be completed on the tax title becoming absolute.

In re BRITISH CAN. L. & T. CO.*Company—Winding up—Insolvency—Preference—Pleading.*

The Winding Up Act, 45 Vict. cap. 23 (D.), does not forbid the preference of a creditor by a company in insolvent circumstances.

The Company had procured a loan of \$150,000, but found the amount insufficient, and made application for a further loan of \$35,000. The Company called a meeting in Scotland, where their head office was, to consider the question of voluntary liquidation.

Held, that their acts were not an acknowledgment of insolvency so as to make the Company liable to be wound up under the Act.

The petitioner alleged, amongst other things, "that the Company has otherwise acknowledged its insolvency," following the words of sec. 9, s-s. (d) of the Act.

Held, as a matter of pleading, that the manner of the acknowledgment should have been specifically stated.

[12TH MARCH, 1884.]

CARD v. COOLEY.

Will, construction of—Dower—Election—Appeal from Master—Weight of evidence.

A testator devised to his wife one undivided half of the south half of lot 34 for life. He also devised to his grandson in fee the south half of lot 34 subject to the condition that his wife should have quiet possession of one half of the land for life.

Held, that the wife was bound to elect between her dower and the devise.

When the Master found that a note, originally unstamped, had been double stamped by the holder under the proper conditions, and that the note was a valid claim against an estate, the Court, though not satisfied with the finding refused to disturb it, being unable to lay hold of any sufficient reason to set it aside.

[26TH MARCH, 1884.]

In re SHAVER.*Will, construction of—Erroneous description of land—Extrinsic evidence—Rejecting erroneous part of description.*

A testator devised to his son "the S. W. quarter of lot 5 in the 2nd concession of Westminster, containing 50 acres more or less." The testator owned the S. E. quarter of the lot on which he and his son had lived for many years, but he did not own the S. W. quarter, nor any other part of lot 5. There was no residuary devise.

Held, that extrinsic evidence was admissible to show what 50 acres the testator owned, and that the erroneous words "S. W. quarter" might be rejected, as there would be left a sufficient description of the testator's land.

[30TH APRIL, 1884.]

CLARKE v. THE UNION FIRE INSURANCE CO.

Winding up Company—Receiver—Rent—Retainer by debtor of Company.

The company deposited with a Loan Company the amount required in order to enable it to carry on the business of insurance. The Loan Company gave a deposit receipt therefor to the Provincial Treasurer, and interest accrued on the deposit, which they paid from time to time to the Insurance Company. The Insurance Company was ordered to be wound up, and the deposit was ordered to be paid to the Receiver. The deposit receipt required six months' notice to be given before withdrawing the money. This notice was given, and the Provincial Treasurer endorsed the receipt to the Receiver. When the money became due on the receipt, the Loan Company paid it over, but retained out of the interest accrued during the six months a sufficient sum to pay themselves the rent of premises leased by them to the Insurance Company and occupied by the Receiver.

Held, that they were entitled to retain the rent out of the accrued interest.

Foster, for the Receiver.

J. H. Macdonald, for the Loan Company.

ARKELL v. ROACH.

Will, construction of—Vesting of shares—Persons who would be entitled under Statute of Distribution—Married Woman's Act.

A testatrix directed that her property should be invested till her son C. should attain twenty-one, then the whole accumulation to be divided into four equal shares. C. was to get the income from one share till he attained thirty, then to get the share absolutely. The remaining three shares to be kept invested till the other three children should respectively attain twenty-one. After attaining twenty-one, each child to have the income of one share till the youngest, F., should attain thirty. Then F. was to get one share absolutely. After F. attained thirty, the income of the other two shares were to be paid to the two remaining children (daughters) till one should die, and thereupon her share should be paid to the person who would be entitled under the Statute of Distributions as if the share were her property. The eldest son attained thirty, and while the youngest, F., was under twenty-one, a daughter, C., died, being of full age and married, leaving her husband and two children.

Held, that the husband and two children, being the persons who would be entitled to one-third each under the Statute R. S. O. cap. 125, sec. 25, were entitled to the share of the deceased daughter.

Street, Q.C., for plaintiff.

MacLennan, Q.C., and *Coyne*, for several defendants.

[FERGUSON, J., 4TH MARCH, 1884.]

EXCHANGE BANK v. SPRINGER.

Principal and surety—Default of principal—Evidence—Onus of proof—Release of surety—Connivance between obligee and principal.

The defendant became surety on a bond for the faithful performance of the duties of cashier of the plaintiff Bank by one M., who subsequently appropriated money of the plaintiffs and absconded. The bond contained an agreement that if moneys became due from M. to the plaintiffs for which the defendant might become liable, a statement made by the plaintiffs should be sent or delivered to the defendant, and in any action should be *prima facie* evidence of the indebtedness, and the burden should lie on the defendant to show that the money was not due. M. deposed that he had not appropriated the plaintiffs' money, but that he could not explain the deficiency without seeing certain entries and papers left by him at the head office of the plaintiff Bank.

Held, that the *onus* lay on the defendant absolutely to disprove the statement of moneys due by M. served on him by the plaintiffs; that it was his duty to have procured the production of the entries and papers spoken of by M.

Held, also, that, in order to be relieved from liability on the bond, the defendant should have shown connivance between the plaintiffs and M., either actual, or implied from negligence on their part.

EXCHANGE BANK v. BARNES.

Principal and surety—Default of principal—Death of surety—Liability of executor.

The defendant was the executor of the co-surety of the defendant Springer in the preceding case. No notice of the death of the defendant's testator was given the plaintiffs. The Court found the defendant liable on the bond for the amount of the penalty and interest.

[FERGUSON, J., 23RD APRIL, 1884.]

THE "MAIL" PRINTING CO. v. THE RHEUMATINE, ETC., CO.

Good will—Trade mark—Formula for patent medicine—Judgment for sale of same.

The plaintiff company recovered a judgment against the defendant company, which was still unsatisfied. Execution against the goods of the company had been returned "*nulla bona*."

W. H. P. Clement now moved for judgment, in default of defence, for the sale of the good will of the defendant company, their registered trade mark, and the formula or recipe showing the ingredients and process employed by them in the manufacture of an article called Rheumatine; to have it referred to the Master to settle an advertisement of the sale; and for an order for the delivery up of the formula, etc.

FERGUSON, J., gave judgment as prayed.

IN CHAMBERS.

[BOYD, C., 28TH APRIL, 1884.

In re BETHUNE & CO., Solicitors.

Solicitor and client—Taxation—Special circumstances.

An application was made by a client, defendant, for taxation of a solicitor's bill under the following circumstances:—The action had been defended and was ready for trial at Toronto. Counsel left the Lindsay Sittings to be present at the trial. Before the trial the parties arrived at a basis of settlement, and the solicitors for the client by their exertions procured a favourable settlement, and consent minutes of judgment were put in. The negotiations lasted for two days, and for the whole of this work a fee of \$150 was charged in a lump sum. During the course of the proceedings, counsel attended, at the client's request, and conducted an examination of parties which lasted far into one night, for which he charged a fee of \$50. These and some smaller items were relied upon as special circumstances, entitling the client to an order for taxation after the expiration of a year from delivery of bill.

Held, reversing the decision of the Master in Chambers, who made the order for taxation, that there were no special circumstances entitling the client to taxation.

Shepley, for the appeal.

Watson, contra.

[APRIL, 1884.

O'DONNELL v. O'DONNELL.

Short notice of trial—Time, computation of—Holidays excluded.

W. H. P. Clement moved to set aside notice of trial. The defendant was on terms to take short notice of trial, and the notice was accordingly served on a Wednesday for the following Monday.

Aylesworth, contra.

The Master in Chambers was of opinion that the notice was irregular, as under Rule 455, which was held to apply to the case of a short notice of trial, Sundays (and other holidays) should be excluded. The application was, however, enlarged to come before the learned Judge at the trial. The application accordingly came before

OSLER, J.A., who held the notice irregular, and set it aside without costs.

[THE MASTER IN CHAMBERS, 24TH MARCH, 1884.
McCULLOCH v. McCULLOCH.

Dower action—Recovery of land—Place of trial.

Held, that an action for assignment of dower is an action for the recovery of land, and the place of trial should be in the county where the land lies.

H. C.

NEW BRUNSWICK

In the Supreme Court.

[APRIL, 1883.

GUY v. RANKIN.

Landlord and tenant—Privilege from distress—Logs delivered to mill-owner to be sawn into deals—Mill-owner jointly interested in the logs—Pleadings.

Logs delivered to a mill-owner in the way of his trade, to be sawn into deals, for remuneration, are privileged from distress for rent.

Held, by Allen, C.J., Weldon and King, J.J., that such privilege is destroyed if the tenant is a joint owner with other persons of the logs.

Per Palmer, J. The tenant's undivided interest can be distrained upon in such a case.

Where in replevin, the defendant avowed the taking as a distress for rent due from R. for a saw-mill; to which the plaintiff pleaded that R. was a manufacturer of deals, and carried on that business in the mill; that before the distress the P. Lumber Company delivered logs to R. to be manufactured into deals at the mill, and to be delivered to them, or to any person to whom they might sell; that the Lumber Company sold the deals to the plaintiff, and that a reasonable time to remove them had not elapsed before the distress. Replication—that by agreement between the P. Lumber Co. and R. they were to purchase logs which were to be sawn by R. at the mill on joint account, and that he was to be jointly interested with the company in the deals so sawn; that the deals replevied were sawn from logs so purchased, and that R. was a joint owner with the company of the said deals;

Held, that this sufficiently showed a joint ownership of the deals between the plaintiff and R.

Quare, whether an allegation that R. was jointly interested with other persons in the deals; or, that he was jointly interested in the profits to arise from the manufacture and sale of the deals, was sufficient to show that he was a joint owner.

Plaintiff claimed the logs from which the deals in question were cut, through the P. Lumber Company.

Held, that the declaration of members of that company, made at the time of a purchase of the logs by them for the company, were admissible to show who were the persons composing the company.

COLWELL v. ROBINSON.

Mortgagor and mortgagee—Account—Evidence—Onus of proof.

In a suit brought for the foreclosure and sale of mortgaged premises, it appeared that both the mortgagor and mortgagee were dead, and that the mortgage and the mortgagee's books were destroyed. A reference was made to a barrister to take accounts of the payments made in the mortgage, and although there was some slight evidence of an additional payment beyond the amount credited by the plaintiff, the barrister disallowed it.

Held, that the burthen was on the defendants to discharge themselves from their liabilities on the mortgage, and that the Barrister properly disallowed the defendants' claim, as the evidence of payment was entirely insufficient, particularly after the mortgagee's death.

GALLANT v. CALDER.

False imprisonment—Amendment at trial—Slander—Publication—Attachment of property—Consol. Stat. cap. 38—43 Vict. cap. 9—Powers of Commissioner.

On the trial of an action in which the declaration contained a count for assault and false imprisonment, the plaintiff put in evidence the *capias* under which he had been arrested at the suit of the defendant, and the affidavit of debt upon which the *capias* issued; and proposed to prove that he was not indebted to the defendant in the amount sworn to in the affidavit, but the evidence was rejected. Plaintiff's counsel then applied for leave to amend his declaration by adding a count for malicious arrest, stating that the present defendant had commenced an action against the plaintiff and made an affidavit that the plaintiff was indebted to him in the sum of \$3,303, for goods sold and delivered, etc., and that the arrest was not made for the purpose of vexing or harassing the plaintiff; that the *capias* was indorsed for bail for the said sum of \$3,303, and was delivered to the sheriff to be executed; and that the defendant caused the plaintiff to be arrested by virtue thereof; averring that the said sum of money was not due from the plaintiff to the defendant at the time of making the affidavit of debt, and of the arrest, and that such affidavit was falsely and maliciously made by the defendant for the purpose of vexing and harassing the plaintiff, and by reason thereof the defendant wrongfully and fraudulently caused the *capias* to be issued, and the plaintiff to be illegally arrested and imprisoned.

This application was resisted by the defendant on the ground that the proposed count was demurrable because it did not state that the action in which the *capias* had issued was terminated; and also that the defendant would be prejudiced by the amendment, as it would introduce a new cause of action, which he was not prepared to answer; and that he required time to determine what he should plead. An affidavit of the defendant's attorney was produced supporting these objections. The amendment was refused.

Held, that it was properly refused.

An action for slander will not lie for words spoken to the plaintiff, unless in the hearing of a third party.

In trespass for taking a horse, waggon and harness, the defendant pleaded that the plaintiff, having been arrested and imprisoned, was examined before a Commissioner under Consol. Stat. cap. 38, as to the state of his affairs; that on such examination it appeared that he was possessed of said goods, and that the Commissioner ordered them to be seized by the sheriff, when, on application of the defendant, they were sold at auction—which was the alleged trespass.

Held, that the Commissioner had power under the Consol. Stat. cap. 38, and the 43 Vict. cap. 9, to order the property to be sold.

[JUNE, 1883.]

THE STAR KIDNEY PAD CO. v. McCARTHY.

Arrest—Affidavit of agent—Affidavit of attorney not sufficient.

The agent of an incorporated company made an affidavit for the arrest of the defendant in an action of debt, stating that the amount of the claim was justly due to the company. The plaintiffs' attorney also made an affidavit that the arrest was made under his advice, and was not for the purpose of vexing or harassing the debtor.

Held, Weldon J., dissenting, that the affidavit of the agent should state that the arrest was not made for the purpose of vexing or harassing the debtor, and it was not sufficient for the attorney to make an affidavit to that effect.

Ex parte PRICE.

Certiorari—Right of review—Delay in applying.

Where a right of review exists, *certiorari* will be granted only under very exceptional circumstances.

Where there has been delay in applying for a *certiorari*, such delay must be satisfactorily explained.

Ex parte MICHAEL FLOOD.

Ex parte PATRICK FLOOD.

Firm of Attorneys—Misappropriation of money by one partner—Liability of co-partner—Summary application to Court.

If an attorney receives money in his character as such, the Court will compel him to perform his undertaking in respect to it.

Where one member of a firm of attorneys receives money for investment, and misappropriates it without the knowledge or consent of the other, it ought to be clearly shewn that the latter was guilty of personal misconduct, or at least, of neglect of duty as a member of a firm, in consequence of the misconduct of his partner, before the Court will interfere on a summary application to compel him to pay the money.

MEEKER v. PETERS.

Practice—Writ signed and sealed by the Clerk of the Court, but issued after appointment of his successor—Capias—Form of—Irregularity—Filing affidavit to hold to bail.

Blank writs duly signed and sealed, and delivered by the Clerk of the Court to attorneys are not affected by the subsequent resignation of the Clerk, but may be issued by the attorney without being re-signed.

A *capias* issued as a first process, but in form a *capias* issued after the commencement of an action, is irregular only, and may be amended.

Affidavits to hold to bail need not be filed before the entry of the cause.

FERGUSON v. SAVOY.

County Court appeal—Omission of appellant's attorney to enter cause on the appeal paper—Dismissing appeal.

A defendant in a County Court case having given the bond and completed the other proceedings necessary for an appeal, afterwards attended at the Clerk's office to enter the cause on the appeal paper, but was unable to do so because the Judge of the County Court had not returned the proceedings. At the next term he again attended for the same purpose, but being still unable to enter the cause, he requested the Deputy Clerk to do so when the return should be filed. Two days afterwards the return was filed, but the Deputy Clerk forgot to enter the cause; and on the last day of the term, on application of the respondent, the appeal was dismissed because the cause had not been entered.

Held, that the order dismissing the appeal was regular; that it was the duty of the attorney to see that the cause was entered; and having made the Deputy Clerk his agent for that purpose, he was responsible for the Clerk's omission.

ROBERTSON v. ARMSTRONG.

Equity appeal—Notice of appeal—Statement of grounds.

A notice of appeal from a decision of a Judge in Equity, under the Consolidated Statutes, cap. 49, sec. 61, must state the grounds of the appeal.

MORRISON v. THE BANK OF MONTREAL.

Equity appeal—Appeal by one of several defendants—Serving notice of appeal.

Where there are several defendants in a suit in Equity, and one of them appeals from the decree, notice of the appeal must be served on the other defendants as well as on the plaintiff.

MANITOBA

In the Queen's Bench.

VIVIAN v. SCOBLE.

Decree for account—Reference to Master—Power to dispute agreement under which account ordered—Intoxication as a defence to agreement.

A decree by consent was made, whereby it was referred to the Master to take an account of the amounts received by the defendant as agent for the plaintiff, under an agreement in writing.

Held, that the plaintiff could not, on the reference, dispute the validity of the agreement.

In order to entitle a party to be relieved from an agreement, on account of his intoxication, it is not enough to show that he was under undue excitement from drinking; it must be shown that there was excessive drunkenness whereby the party was deprived of his reason, or contrivance by the other party to produce drunkenness and then procure the agreement.

The plaintiff agreed with the defendant to give him a commission for selling lands; certain expenses, including auctioneer's fees, to be borne proportionately. The defendant employed an auctioneer who deducted a commission of five per cent. from the proceeds of sales made by him. The defendant might, with care, have procured a competent auctioneer for two per cent.

Held, that he was chargeable with the difference as against the plaintiff.

This was a rehearing of an order made by Dubuc, J., dismissing an appeal from the Master's report. The order was a formal one, drawn up by consent of the parties, in order that the report complained of might come under review by the full Court.

Howell and Hough, for the plaintiff.

Killam and Haggart, for the defendant.

The facts fully appear in the judgment of the Court, which was delivered by

TAYLOR, J., 3rd March, 1883. The suit is one in which the plaintiff seeks an account of moneys received by the defendant as his agent in connection with the sale of certain lands. The defendant in his answer sets up an agreement under seal executed by the plaintiff, by which he agreed to give the defendant, in consideration of services to be rendered in selling the land, collecting the purchase money, and keeping the accounts of the transactions, twenty per cent. of the total receipts of the sales. The agreement also provided "that all expenses of, and incidental to, the said sale, the preparation and registration of plans, the paying of auctioneer's fees, and the preparation of conveyances, shall be borne in the following proportions, that is to say, the party of the first part shall bear, and allow to be deducted out of the proceeds of such sales, four-fifths of the total of said expenses, and the party of the second part shall pay out of the twenty per cent. so allowed to him as above mentioned, the remaining one-fifth of said total expenses."

The cause having come on for hearing, a consent decree was made on the 15th September, 1882, declaring the plaintiff entitled to an account of the dealings and transactions of the defendant with the lands in question. It then went on to direct the taking by the Master of the following accounts, (i) an account of all sums of money received by the defendant as agent for the plaintiff in regard to the sale of the lands in the bill of complaint set forth; (ii) an enquiry when such sums of money were respectively received; (iii) an account of the expenses properly incurred by the defendant in connection with the sales of the said lands; (iv) an account of what moneys, if any, were paid by the defendant to the plaintiff out of the proceeds of said sales. The decree then went on to order that the balance found due to the plaintiff upon taking the said accounts, if any, should be paid into Court, less the defendant's commission of twenty per cent. upon the moneys actually received by him.

The Master, having proceeded under this decree, made, on the 25th of November, 1882, the report now appealed from.

It may be remarked in passing, that this report in its findings does not follow the enquiries as directed by the decree.

It finds, in answer to the first enquiry, the amount received by the defendant to be \$26,126.16.

It then finds the amount paid out by the defendant to and for the plaintiff, between 16th January, 1882, and 14th February, 1882, to be \$13,569.93. It then goes on and allows defendant twenty per cent. commission on the sum of \$25,326.16, equal to \$5,165.25. These two sums of \$13,569.93 and \$5,165.25 are deducted from the first sum of \$26,126.16, and the balance, \$7,390.93, is stated to be the amount due from the defendant to the plaintiff. The report nowhere shows when the sums of money were received by the defendant, nor the amount of expenses properly incurred by him.

It sometimes happens that when a decree is being proceeded upon in the Master's Office, the solicitors do not desire, or find that it is not necessary, to make all the enquiries or take all the accounts directed by it. When that is the case the report should show on its face that the parties waived the making of certain enquiries and taking certain accounts, as the Master's justification for not obeying the decree in its entirety.

The parties here may have waived the enquiry as to the times when the various sums were received; they certainly did not waive the enquiry as to expenses properly incurred, for it is out of the Master's disposition of one item of these expenses that the present appeal arises.

From the written judgment of the Master which we have had before us, it appears that, upon the decree being brought before him, he proceeded to enquire into the validity of the agreement set up in the defendant's answer, and after taking evidence on this subject, declared it invalid, on the ground of improvidence and undue advantage taken of the plaintiff by the defendant.

Now, in my judgment, the Master had no power to deal with this agreement in the manner he has done. It is quite true that a Master has very extensive powers, and, under the general orders of this Court, much more extensive powers than were ever possessed by the Master in England

but the right to exercise these powers must be determined by the manner in which the particular case comes before him.

In the case of *Hodgins v. McNeil*, 9 Gr. 305, referred to by the Master in his judgment, a decree was made for the administration of an estate. In presenting the decree the Master had necessarily to inquire as to who were the next of kin. In answer to a claim to be one of the next of kin, the objection was taken that the claimant was illegitimate, as being the issue of a marriage between a man and his deceased wife's sister. Clearly, in such a case, the Master had to dispose of the question then raised, exceedingly important although it was.

So, in *The Edinburgh Life Insurance Company v. Allen*, 23 Gr. 230, in taking the account of what was due the plaintiff, as the assignees of one Gamble, the question arose whether the plaintiff's claim was limited to the amount due Gamble at the time the trust deed was executed, or whether an agreement subsequently made, by which Allen charged the surplus in Gamble's hands after satisfying the trusts of the deed, with further advances made to him, accrued to their benefit or not. That agreement had been referred to in the pleadings, but it related merely to the account to be taken under the decree, and to the question whether the account claimed was to stop at a particular date or not. So the Court held that the Master could deal with it.

In *Shuter v. Johnston*, a partition suit, the claim of two members of a family to be heirs-at-law was disputed, on the ground that they were born before a marriage between their parents was celebrated in the United States. There the Master had to decide the question, a decision of which was evaded by the late Chancellor Vankoughnet in *Cullen v. Cullen*, namely, whether a previous secret marriage in Montreal by a Catholic priest, without license or publication of banns, was valid or not.

So, in *Re Smith*, a suit for administration and partition, a woman came forward claiming dower as the widow of the intestate, and to be entitled to a life estate in the share of her deceased child. Her marriage to the intestate being disputed, the Master had to enquire into it, and found that no marriage had taken place, and that the marriage certificate produced was a forgery.

In *Darling v. Darling*, 15 C. L. J. 112, which was an administration suit, an office copy of the decree was served upon an annuitant under the will, who came in claiming the full annuity given her, and a large amount for arrears unpaid. In answer to the claim, the executor produced a document by which she had many years before released a portion of the annuity. This document the annuitant then alleged had been obtained from her by the fraudulent representation that the will was void, and that she was entitled to nothing but what the charity of the next of kin chose to give her, a fraud which she never discovered until she had been served in the suit. The question of whether the release had been so obtained, the Master held could be entertained by him.

In all these cases it will be seen that the question was one which arose in the Master's office, and could not have been raised at an earlier stage in the suit. The case here is entirely different. The agreement was set up in the answer, and is the foundation of the defendant's claim to the re-

muneration for his services. Had the plaintiff desired to impeach that document he should have amended his bill, setting up that the alleged agreement had been obtained from him improperly and by taking undue advantage of him. But he did nothing of the kind.

Then the Court made a decree directing certain enquiries, and ordering that the balance in the defendant's hands, less the defendant's commission of twenty per cent., should be paid into Court. By so doing the Court recognized that instrument as valid, for the only right the defendant had to a commission of twenty per cent. was derived from it. The Master then had no power to declare that agreement void, and the first ground of appeal should be allowed.

The fifth ground of appeal should also be allowed. I have been unable to find, on a careful perusal of the evidence, anything which will support a finding that the plaintiff was intoxicated at the time of making the agreement. There is no doubt from the evidence that the plaintiff was, about the time in question, drinking heavily. But to set aside a contract on account of drunkenness, it is not sufficient that the party is under undue excitement from liquor; *Crippen v. Ogilvie*, 15 Gr. 490; 18 Gr. 253. It must rise to that degree which may be called excessive drunkenness, where the party is deprived of his reason and understanding; *Lightfoot v. Heron*, 3 Y. & C. 586. Nor is there any evidence here that the defendant by contrivance induced the plaintiff to take too much drink, and afterwards took advantage of his condition by entering into the agreement with him. See *Cooke v. Clayworth*, 18 Ves. 12; *Say v. Barwick*, 1 V. & B. 195; *Nagle v. Baylor*, 3 Dr. & War. 60.

The sixth ground of appeal is that the Master improperly disallowed the commission of five per cent. charged by the auctioneer. The agreement says that the expenses, including among these "the paying of auctioneer's fees," are to be borne by the parties in certain proportions. The Master, however, while allowing the defendant the twenty per cent. commission, has charged against him not a proportion but the whole of the auctioneer's fees. At least it was so stated by counsel on the argument. The defendant appeals on that ground, and the plaintiff's counsel admitted that it was so. No person reading the report would ever discover that to be the case; for in it the master allows him for commission, \$5,195.23 which is \$100 more than the proper commission upon the amount stated as having come to his hands.

In connection with this sixth ground of appeal I presume the seventh should be taken. It is as follows:—"Because the Master, in his said report, charges the defendant with moneys which never came to his hands and were never received by him." The foundation for this seventh objection, as I understand it, is that the auctioneer's fees, as charged by Wolf, were not paid to him by the defendant out of moneys which he had received, but were retained by Wolf out of moneys in his hands, proceeds of sales of the land in question. The evidence shews that the lands were sold by Wolf, the plaintiff assenting to his being employed, and that Wolf charged and retained a commission of five per cent. upon the amount realized. This is objected to as excessive and as improper, because it resulted from the defendant's negligence in not making a bargain with Wolf before the sale.

Under the terms of the decree this was a matter which it was quite competent, nay, which it was incumbent upon the Master to enquire into. He has, however, in my judgment erred in charging the whole amount against the defendant.

For the present I waive the consideration of the seventh objection.

Under the agreement "the payment of auctioneer's fees" was part of the expenses to be borne by the parties in proportion to their interests. The auctioneer here was employed with the assent of the plaintiff. He was the medium through which the property was actually offered to the public, and the person by whom the large sum realized was obtained. Benefit was derived from his services. The Master should therefore have enquired what would have been the proper amount of his charges, had the defendant been careful to make a bargain with him before the sale, and have allowed as part of the expenses properly incurred the amount so ascertained.

Were I to express an opinion as to what would be, from my reading of the evidence, the amount at which the services of this auctioneer, or of a competent auctioneer, could have been secured, had care been taken to make a special arrangement with him beforehand, I should say about two per cent.

The remainder of the sum falls within the scope of the seventh objection. As to it, notwithstanding Mr. Killam's very able argument against the defendant being liable for the money when it never came to his hands, but was retained by Wolf, I have come to the conclusion that the defendant should be charged with it. He was the paid agent of the plaintiff, paid a high commission to attend to all matters connected with the sale of this land. It was, as such agent, part of his duty to make arrangements with an auctioneer, and to see that no unnecessary expenses were incurred. From the evidence it is clear that by a special arrangement made beforehand the services of a competent auctioneer could have been obtained for a smaller amount. It was owing to his negligence that such an arrangement was not made, and therefore, I think, that the loss occasioned to the plaintiff by his neglect may very fairly be charged against him.

The report must be referred back to the Master to be reviewed, unless, guided by the foregoing findings, the parties can come to a conclusion upon the proper amounts to be allowed and charged, in which case an account may be taken by the order thus avoiding delay and expense.

Costs of appeal and rehearing to be taxed and allowed according as parties failed or succeeded, following *Bank of Montreal v. Ryan*, 13 Gr. 204.

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ONTARIO LEGISLATION, 1884.

THE capacity of our Provincial Legislature for making laws remains undiminished. The late session was productive of quite the average quantity of statutes, many of them of great importance.

Relief of Deputy Returning Officers.—The political history of this Act, chapter 5, we have nothing to do with. We refer to it merely for the purpose of pointing out the extent to which the Legislature has gone in meddling with pending actions. *Walton v. Apjohn*, ante p. 182, is expressly excepted from its operation, but all other pending actions are practically disposed of by the Act. The modesty of the legislators did not prevent them from inserting a clause giving the plaintiffs the right to discontinue their actions and tax costs against the defendants contrary to the general rule, thus tacitly admitting that the actions were just, and that the defendants were justly liable to costs. The British North America Act provides that the Legislatures may make laws, not that they may make judgments or decrees. But interference with a pending action, directing its course, and making a final disposition of it, is not making a law. It is a plain usurpation of judicial functions. Municipal law is defined by Sir Wm. Blackstone in well-known words. It is "a rule of civil conduct prescribed by the supreme power in a state. * * And first, it is a rule; not a transient sudden order from a superior to or

concerning a particular person; but something permanent, uniform, and universal. Therefore a particular act of the legislature to confiscate the goods of Titius, or to attain him of high treason, does not enter into the idea of a municipal law; for the operation of this act is spent upon Titius only, and has no relation to the community in general; it is rather a sentence than a law. But an act to declare that the crime of which Titius is accused shall be deemed high treason; this has permanency, uniformity, and universality, and therefore is properly a *rule*."

In the United States, where, as we know, the Legislatures act under written constitutions, the importance of confining them to their legitimate functions has been recognized. Thus, in *Wade on Retroactive Laws*, sec. 157, it is said, "In *Lane v. Nelson*, 79 Pa. St. 407, decided by a Court which has always recognized the power of the Legislature to pass retrospective laws when they were neither *ex post facto* nor violative of contracts, the following language is used by Mr. Justice Paxson in delivering the opinion:—'It is settled by a current of authority, that the Legislature cannot, by an arbitrary edict, take the property of one man and give it to another; and that when it has been attempted to be taken by a judicial proceeding, as a sheriff's sale, which is void for want of jurisdiction, it is not in the power of the Legislature to infuse life into that which is dead.' And again, in the same connection:—'*To exercise judicial powers is not within the legitimate scope of legislative functions*; and where vested rights are divested by acts of this character, they will, and ought to be, judged inoperative, null, and void.' " We do not forget the decision of our Court of Appeal which held that the Legislature could make or alter a man's will after his death; nor the *dictum* of the Judicial Committee of the Privy Council, that the Legislatures *when acting within their sphere* are supreme. So far their Lordships of the Privy Council have refused to define the sphere of the Legislatures, but have confined themselves to deciding each case as it arises. What their sphere may be is therefore still problematical. If the Legislature chose to dispose of each case as it arose, no doubt

that would be just as lawful as disposing of an occasional case like those under review. But to do so would be to constitute themselves Judges, to erect themselves into the Judiciary of the Province, a power that they most certainly do not possess. Probably the cases are too well settled to permit of a judicial determination of this point in Ontario; and we cannot hope for any assistance from the Privy Council until the point is actually raised before that Court.

Division Courts Act.—By section 125 of the Division Courts Act, debts due to a mechanic, workman, etc., cannot be attached except as to the excess above \$25. But by the amendment enacted by chapter 9 of the late session, the clause is not to apply to any case where the debt has been contracted for board or lodging, and in the opinion of the Judge the exemption of \$25 is not necessary for the support of the debtor's family. The language is commendable for its ambiguity only. It is not clear whether the debt contracted for board and lodging is the debt due to the primary creditor, or the debt due to the primary debtor and sought to be attached. It may also have to be decided whether it is the exemption or the \$25 that is necessary or not necessary for the support of the debtor's family—and which debtor's family it is necessary for, that of the primary debtor or that of the garnishee. The remainder of the Act provides for issue of garnishee process and service upon foreign companies.

The Creditors' Relief Act.—The second section of chapter 10 brings into force the Creditors' Relief Act, 1880, which had since its passage lain in abeyance. How the Act will work cannot well be ascertained until actual practice has developed its peculiarities. The most serious question that suggests itself is its constitutionality. There is no doubt that it is not based upon the insolvency of execution debtors, and, if the assertion of the Legislature itself (sec. 28) has any efficacy, it is not an insolvency law. We presume, however, that it is not necessary that a bankruptcy or insolvency law should make use of those terms in order to be brought within number 21 of sec. 91 of the B. N. A. Act. If the scope of the Act is plainly a general law for the rateable

distribution of the assets of a debtor amongst his creditors, we presume that would be sufficient to give it the character of an insolvency law. It is not essential to such a law that the assets of a debtor to be distributed thereunder should be insufficient to pay his debts, for the Insolvent Act of 1875, sec. 99, made express provision for the payment to the insolvent of the surplus "after payment in full of all debts due by the insolvent," and a case actually arose lately in which this section was applied: *Re McDougall*, 8 App. R. 309; 3 C. L. T. 454. In *L'Union St. Jacques v. Belisle*, L. R. 6 P. C. 31; 1 Cart. 63, Lord Selborne, in dealing with a Provincial Act passed to relieve a local company of financial embarrassment, said (with reference to "Bankruptcy and Insolvency" in section 91 B. N. A. Act), "there is no indication in any instance of anything being contemplated, except what may be properly described as general legislation; such legislation as is well expressed by Mr. Justice Caron when he speaks of the general laws governing Faillite, bankruptcy and insolvency, all which are well known legal terms expressing systems of legislation, with which the subjects of this country, and probably of most other civilized countries, are perfectly familiar. The words describe in their known legal sense provisions made by law for the administration of the estates of persons who may become bankrupt or insolvent, according to rules and definitions prescribed by law, including of course the conditions in which that law is to be brought into operation, the manner in which it is to be brought into operation, and the effect of its operation. * * The Act does not terminate the company; it does not propose a final distribution of its assets on the footing of insolvency or bankruptcy; it does not wind it up." If the Act had wound up the company, if it had proposed a *distribution* of its assets on the footing of insolvency, *i. e.* we presume, a rateable and equitable distribution as far as the assets would reach, or if it had been a general law, we infer from his Lordship's remarks that the statute would have possessed the characteristics of an insolvency or bankruptcy law. The Creditors' Relief Act possesses the elements of generality and

rateable distribution of assets—the foundation of an insolvency law. Such a matter as the discharge of the debtor, though incidental to an insolvency law, is not essential to it, and its absence from the Act cannot be any evidence of the character of the enactment.

Preferences.—R. S. O. cap. 118, sec. 2, is amended by declaring that where any gift, transfer, etc., is made by an insolvent to one or more of his creditors, “whereby such one or more of the creditors of such persons would obtain a preference over his other creditors, or over any one or more of such creditors,” then such gift, etc., shall be void. The Act, as it originally stood, provided only for the case of a transfer made with intent to give a preference, and therefore did not prohibit such a transfer where the debtor’s action was not voluntary. The construction of section 2 of the Act by the Court of Common Pleas in *Gottwalls v. Mulholland*, 15 C. P. 62, affirmed in appeal, 3 E. & A. 194, has been followed ever since that case was decided, and the doctrine of that case, and the doctrine of pressure, are now abolished by this amendment. In Manitoba the validity of an enactment which is a transcript of the original section two of this Act was brought in question, and its constitutionality was determined by Mr. Justice Taylor: *Bleasdel v. Townsend*, 3 C. L. T. 509.

Interest on judgments.—Sections 266 to 269 of the Common Law Procedure Act came in question in *Quinlan v. Union Fire Ins. Co.*, 8 App. R. 376; 3 C. L. T. 257. In that case the plaintiff got a verdict in an action on an insurance policy, and his verdict was set aside by the Court of Common Pleas. The Court of Appeal restored the verdict, but were of opinion that interest could not be lawfully allowed on the verdict. Section 269 of the C. L. P. Act refers to actions “on any account, debt, or promises,” and declares that verdicts in such cases shall bear interest from the time of their rendering. The Court held that an action on a policy was not within this section. The amendment under review extends the operation of section 269 to all the cases in which interest may be allowed in giving the verdict or judgment under sections 266, 267 or 268 of

the C. L. P. Act. Another very useful amendment is apparently thus made, based upon *Quinlan's* case. By section 43 of the Court of Appeal Act, when the Court of Appeal gives judgment for the *respondent* interest shall be allowed by the Court for such time as execution has been delayed by the appeal. In *Quinlan's* case judgment was given for the *appellant*, and therefore the Court, under this section, could not award him interest. The Court of Appeal Act assumed (in order to be generally beneficial) that the respondent in every case would be the party holding the verdict. The phraseology of the amendment seems to indicate that section 43 of the Court of Appeal Act is practically repealed; for the verdict "shall bear interest," so says the amendment, "from the time of the rendering of the verdict * * notwithstanding that the entry of judgment * * shall have been suspended by * * proceedings * * in appeal."

Division Courts.—Appeals in interpleader issues are now to be allowed (section 9 of chapter 10) where the value of the goods exceeds \$100, and on consent in all cases from a decision on an application for a new trial subject to the provisions of secs. 17 to 22 of the Division Courts Act, 1880. On an application for a new trial the Judge may give the judgment which ought to have been pronounced at the trial. Provision is made for the framing of a County Court tariff by the board of County Judges.

Execution of Commissions for Foreign Tribunals.—Section 12 of chapter 10 is an enactment, the usefulness as well as the constitutionality of which is doubtful. By 31 Vict. cap. 76 (D), the Courts in Canada are empowered to order the examination of persons whose testimony is desired for use in civil and commercial matters pending in Courts in any other of Her Majesty's Dominions, or in any foreign country. A case recently arose in which the evidence of persons in Ontario was required in a case pending in the United States. The witnesses, being unwilling to give their evidence, disputed the validity of the Act, and claimed that the subject matter was properly within the jurisdiction of the Provincial Legislature. The Chancery Division, however, decided that it did not come within the adminis-

tration of justice in the Province, nor pertain to civil rights in the Province, but was a matter of international comity, and therefore within the jurisdiction of the Parliament of Canada: *In re Wetherell v. Jones*, 4 Ont. R. 718; 8 C. L. T. 499. In the face of this decision it is difficult to see why the Ontario enactment was passed. The subject matter is identical with that of the Dominion Act, and varies only in some of the details. In fact the language of the enactment follows so closely the language of the Dominion Act, that the draughtsman could hardly deny that he had borrowed from it. If the case in the Chancery Division is right this enactment is *ultra vires*.

The wisdom of the Legislature has directed that this chapter 10 shall be construed as part of the Judicature Act, 1881, though it makes provisions respecting the Creditors' Relief Act, Fraudulent Preferences (R. S. O. cap. 118), Interest on Verdicts (C. L. P. Act), Suitors' Fee Fund, Appeals in Division Court proceedings, Interpleader in Division Courts, New Trials in the same, a County Court Tariff, Taking Evidence for Foreign Courts, Sheriffs' Fees, and Returns from various officers, none of which have a very intimate connection with the subject matter of that famous enactment. The whole chapter looks as if the sections had been drawn by different persons, and put together by some one with his eyes shut.

Thunder Bay Judicial District.—A new provisional judicial district is created by cutting off from the district of Algoma the territorial district of Thunder Bay. A District and Surrogate Court are erected, and the jurisdiction of each is defined.

The Ontario Mortgage Act, 1884.—This is one of those Acts, of which we have too many, which gratuitously interfere with the rights of parties to contracts. It is difficult to ascertain its origin, but it owes it probably to the imagination of ignorant, unprofessional conveyancers. The second section (the first contains merely the short title), sub-section 1, recites that "in order to prevent the making of unnecessary and vexatious costs in respect to mortgages, it is hereby enacted, etc." It is almost unnecessary to say

that costs unnecessarily or vexatiously incurred are never allowed, even to a mortgagee. *Graham v. Ross*, 3 C. L. T. 592, is an instance of this. The learned Judge who tried the case, being of opinion that the action was oppressive, refused a mortgagee the costs of an action in which he had succeeded. The Act, however, if not now inoperative by reason of being easily avoided, will no doubt soon become inoperative by contracts avoiding it, and will certainly result in mortgagees adopting more harsh proceedings than they otherwise would do. Sub-section 1 of the second section declares in substance that where a demand of payment or notice of sale has been given under any condition or proviso contained in a mortgage, no further proceedings at law or in equity shall be taken, and no action of any kind shall be commenced (without an order of a Judge) until after the lapse of the time at or after which, according to such demand or notice payment of said moneys is to be made, or the power of sale is to be exercised. The section is based upon a knowledge of a very common, but very erroneous and unsafe procedure, viz., that of setting out in the notice of exercising the power of sale the amount due and in arrear, a demand of payment within a certain time, and a notice that if payment be not made within that time the mortgagee will proceed (then follow the words of the power as to leasing and selling). All this is unnecessary. If any notice is necessary under the power, a mere notice that the condition is broken and that the mortgagee intends to exercise the power of sale is sufficient. It will be observed that the time within which proceedings may not be taken is the time mentioned in the notice, not in the mortgage. This clause may therefore be easily avoided by omitting all the unnecessary portions which we have said are usual in practice, and giving a simple notice of intention to proceed under the power without naming any time therein.

Every well-drawn mortgage contains, in addition to the statutory power, various other stipulations as to exercising the power. For instance, that it may be exercised without notice in case a certain number of months' interest is over-

due, or in case the mortgagee advertises for a certain number of weeks. Mortgagees who have this advantage will do well to proceed without notice at all. The action to recover the land which is usually commenced when the power of sale is intended to be exercised is no doubt within the terms of the statute, the words being "no suit or action either to enforce such mortgage, or with respect to any clause, covenant or provision therein contained, or the lands or any part thereof thereby mortgaged." It would be a simple act of justice to permit this action to be commenced in every case where a notice of sale is given; for it is useless to sell the land unless the vendor is prepared to deliver possession. It has been suggested that the effect of this section may be avoided by issuing all necessary writs first and giving the notice of sale afterwards. If we are right in thinking that it may be avoided by omitting the mention of any period of time in the notice this is unimportant. But it is not quite clear, assuming its importance, that the issue of the writ first will make any difference. After the notice has been given, no further proceedings at law or in equity shall be commenced or taken. This would be sufficient to indicate that the giving of a notice under the power was of itself to be a stay of all future proceedings, whether the action was instituted before it or after it, if it were not for the provision in sub-section 3 of this section as to the entitling of the affidavit upon which leave to proceed is to be granted. The affidavit is to be entitled, "In the matter of a mortgage, etc," which very clearly indicates that the Legislature had not in mind a pending action. But it is at least doubtful if this will control the very broad terms of the first sub-section.

The third section declares that when any such demand or notice as that referred to in the second section "requires payment of all moneys secured to be paid (*sic*) by or under a mortgage" the party making the demand shall accept payment if made as required by the terms of the demand. The principle of *Cruso v. Bond*, 1 Ont. R. 383, is thus applied to proceedings under powers of sale. The mortgagor may gain ten days in addition to the time mentioned in the

notice by disputing the costs and having them taxed. The effect of this section may also apparently be very easily avoided by not giving a notice, or by omitting from a notice given any mention of the sum in arrear, or the time for payment.

The result of the Act would appear to be rather unfavourable than favourable to mortgagors, while it hampers the free action of mortgagees in realising on their securities. A great deal of misapplied sympathy is wasted upon mortgagors, who are ready enough to borrow but slow enough to repay.

Mechanics' liens.—The wisdom of the Legislature is again displayed in making honest and solvent owners' lands a better security for dishonest and insolvent builders' debts than heretofore. By R. S. O. cap. 120, sec. 3, it is enacted that "unless there is an express agreement to the contrary" every mechanic shall have a lien, etc. This has been, if not construed at least understood, to mean that the agreement referred to is the agreement with the head contractor. This reading was confirmed by 45 Vict. cap. 15, which gave a preferential lien for wages "notwithstanding any agreement between the owner and contractor for excluding a lien." Chapter 18, section 1, of the late session now gives a lien to every person mentioned in the above quoted section of the revised statute, "unless he signs an express agreement to the contrary." This places the owner at the mercy not only of the contractor but of his sub-contractors and all persons who may furnish any material for the building.

Section 2 requires the particulars of the expiry of the period of credit agreed to by the lien-holder for payment for his work to be stated in his claim.

Section 6 permits any lien-holders of a class which is represented in an action to prosecute the action for the benefit of his class in case of the refusal of a prior plaintiff to do so. In *McPherson v. Gedge*, ante p. 89, this right was accorded to a lien-holder where the plaintiff prosecuting the suit assented to its being dismissed, but as the Court was not unanimous, and as the learned Judge whose

judgment was appealed from was of a contrary opinion the question could not be said to be free from doubt.

Upon the subject of mechanics' liens and payment of workmen we might profitably follow the example of Manitoba, whose legislature is far superior to our own. By a recent Act every contractor is to keep a pay sheet, and every payment to the men in his employment is to be attested by their signatures respectively, and any proprietor may require the production of such pay list before the payment of any amount claimed to be due on the work. On every Saturday, or within three days thereafter, any unpaid workman may deliver to the proprietor his claim in duplicate in presence of a witness, and from the time of the delivery the contract price shall be attached up to the amount of the claim. Payments made thereafter to the contractor do not affect the workman's right to sue the proprietor for the amount attached. This is practical. The workman is permitted to go at once to the source from which the money flows. The shortest practical method of obtaining payment is given to him, with the greatest amount of justice to the owner, who is in no danger of being obliged to pay the claims of workmen twice, once to the contractor and again by satisfying the liens on his land. Under our law the mechanic is given a law suit, and generally a long one, for his work or material.

The Married Women's Property Act.—This enactment, chapter 19, contains too much to be reviewed at length here. We have but one remark to make as to legislation respecting married women, viz., that enough laws have been made for their so-called emancipation, and it is quite time that laws for the emancipation of their creditors should be made.

Insurance for Wives and Children.—The principle of this enactment is apparently the same as that which we theretofore had in the Revised Statutes. It will, however, be found entirely different upon examination. The difference in principle consists in the complexion given to the Act by section 23, which enacts that "where all the persons entitled

to be benefited under any policy are of full age, they and the person insured may surrender the policy, or assign the same, either absolutely or by way of security. The policy of the previous Act was to provide a fund for widows and children, which would be free from the claims of creditors after the husband's death, and during his lifetime free from the power of either husband or wife to anticipate the benefits to be derived from the policy. So it has been held in many cases in the United States that a policy in favour of a wife taken out under a similar statute could not be assigned by the husband (otherwise than as permitted by the Act), even when the wife joined in the assignment. And, notwithstanding any such assignment, the widow has been held entitled to recover the amount after her husband's death for her own use. Non-negotiability was the characteristic of a policy under the former Act. Under the present one, the policy may be turned into money at any time by husband and wife, and the benefit to the wife is thus to a great extent lost. The first section of the Act makes it apply to "every lawful contract of insurance now in force or hereafter effected." *Quære*, however, whether it extends to policies theretofore endorsed to wives or children, so as to make them negotiable.

The remaining legislation is not of very general interest.

EDITORIAL REVIEW.

The Conspiracy Case.

Some people are fond of saying, with a show of wisdom, that circumstances alter cases. Perhaps no case was ever so altered by circumstances as the case of *The Queen v. Bunting, et al.*, better known as the conspiracy case. The innocence or guilt of the defendants is now becoming entirely a matter of secondary interest and importance, to the profession at least, in view of the important questions which have been raised before the Divisional Court. The Crown took out a rule for the argument of the demurrer to the indictment without having commenced proceedings *de novo* after the return to the writ of *certiorari*. Thereupon the defendants moved to quash the proceedings on the ground of irregularity, claiming that they should have been called upon to appear and plead to the indictment in the Divisional Court. The answer of the Crown is that, by force of the Judicature Act, the learned Judge sitting at a Court of Oyer and Terminer was in fact the High Court of Justice, and that the whole proceedings are still in the High Court of Justice. This leads to the conclusion that the *certiorari* was, if not improper, perhaps unnecessary. It is, however, admitted that some formal procedure must have been resorted to in order to get the case before the Divisional Court, and, no other procedure being known, that by *certiorari* is as convenient as any.

The defendants support their motion by contending that the Judicature Act in constituting the Supreme Court of Judicature and the High Court of Justice, one of its divisions, did not in fact create new courts. The Supreme Court of Judicature is not a Court, as that term was under-

stood before the Judicature Act; neither is the High Court of Justice. These "Courts" never sit as Courts. The three Divisions of the High Court of Justice are entities just as distinct since the Act as the old Courts, their predecessors, were before it. The High Court of Justice is therefore merely the name of a system of Courts; and neither the Divisional Court nor the Judge sitting at Oyer and Terminer is the High Court of Justice. Hence, when the defendants pleaded at Oyer and Terminer they pleaded in another Court than that before which they are upon the return to the *certiorari*, and they must be required to plead *de novo* according to the established practice. Again, the Legislature could not, and did not intend to, affect practice or procedure in criminal cases, or the practice and procedure on the Crown side of the Queen's Bench—that being clearly within the jurisdiction of the Parliament of Canada. The practice and procedure observed before the Judicature Act must therefore be still observed.

We have given the merest sketch of the points raised, the arguments of which were very able. The result will be awaited with a great deal of interest.

Changes in the Judiciary.

The vacancy in the Court of Appeal, caused by the death of the lamented Chief Justice Spragge, has been filled, as it was generally anticipated it would be, by the appointment (we prefer not to say promotion) of Chief Justice Hagarty to be Chief Justice of Ontario. To say that this appointment was generally anticipated, is to say that it was by common consent acknowledged to be the most fitting appointment; and to say more would savour too much of adulation to demand universal acceptance.

We say the appointment in preference to the promotion, because we constantly hear stage whispers of "bargains with the Government" made upon acceptance of judicial appointments; "well-deserved promotion," as if the services of a Judge had established a claim upon the Crown for preferment. It is true that a Judge may exhibit talents

undiscovered by many before his appointment, or an unusual or phenomenal aptitude for judicial work. His consequent preferment is then nothing more than the appointment of the best lawyer to the chief position—a principle the due observance of which will always give us a strong and highly respected Bench. We have reason constantly to congratulate ourselves upon possessing this inestimable blessing.

The appointment of Mr. Justice Cameron to be Chief Justice of the Common Pleas leaves the Queen's Bench Division with but one of its former members, and the absence of the latter upon leave has made it necessary for Mr. Justice Osler to absent himself from the Court of Appeal in order to make a quorum in the Queen's Bench Division. This might have been avoided by a speedy appointment to the vacancy in this Court, and no very good reason has been suggested why the vacancy should not have been filled in time for the business of the Divisional Court. The same dilatory policy was pursued without excuse in the appointment of Mr. Justice Rose.

Unprofessional Advertising.

The *Manitoba Law Journal* takes us to task for the rather unprofessional cards of several gentlemen which appear upon the cover of this journal. We take it for granted that the cards are there because our contemporary says so, but the writer has not had the curiosity to look for them, and, as a rule, has neither time nor inclination to read that part of a journal which he takes an active part in producing. We are rather puzzled to know whether the advertisements and cards, professional and unprofessional, are the only parts of the *Canadian Law Times* that our friend reads, or whether, unlike our friend of the *Canada Law Journal*, upon reading the whole, he finds food for criticism in the advertisements only. We are inclined to think that he dips into the editor's work occasionally, if a faithful reproduction of an occasional report of a Manitoba case is any indication that the *Canadian Law Times* is considered readable in the

Prairie Province. We can satisfy our learned friend immediately as to the employment of an inspector of our advertising columns. We assure him that the publishers will not go to that expense as long as the inspection is done gratis. We do not promise, however, to follow the inspector's advice in every instance. But if our Law Society should ever fling us such a handsome pair of golden crutches as those which our Manitoba friend uses, we shall be happy to abjure advertising and say never a word to those who walk without them.

The Osgoode Society's Dinner.

The annual dinner of the Osgoode Literary and Legal Society came off during the past month, and was, as usual, a great success.

The importance of this annual gathering is that it brings together every year many members of the Profession, and affords an opportunity for the discussion of subjects of interest which cannot be discussed elsewhere.

We understand that the Benchers have this term passed a resolution to permit the Society to hold the dinner at Osgoode Hall hereafter.

BOOK REVIEWS.

A Manual of Costs; with Forms of Bills of Costs under the Ontario Judicature Act. By JOHN S. EWART, of Osgoode Hall, Barrister-at-Law. Toronto: Rowsell & Hutchison. 1884.

This invaluable book has been long expected, and will be gratefully accepted by every practitioner. The first edition was universally used and appreciated, and the same success has been awaiting this edition for some time. We advise every solicitor who has a bill to make up to buy one. It will show him how to make the most out of the smallest tariff on earth.

Lyrics of the Law. A recital of songs and verses pertinent to the law and legal profession, selected from various sources. By J. GREENBAG CROKE. San Francisco: Sumner, Whitney & Co. 1884.

This is one of the Legal Recreation series, and consists of a variety of verses, good, bad, and indifferent. A half-hour may be spent in the enjoyment of a little congenial nonsense by conning over the pages of Mr. Croke's miscellany.

REVIEW OF EXCHANGES.

Irish Law Times.—6th October, 1883.

Forms under Acts of Parliament. In *Attorney-General v. Lamplough*, L. R. 3 Ex. Div. 229, Brett, L.J., said, "A schedule in an Act is a mere question of drafting, a mere question of words. The schedule is as much a part of the statute, and is as much an enactment as any other part." In *R. v. Baines*, 12 Ad. & E. 226, Lord Denman said that a form, though embodied in an Act, cannot be deemed conclusive. If there be any contradiction between the Act and the form, upon ordinary principles the form which is made to suit the generality of cases must give way.

Ibid.—13th October, 1883.

Marginal Notes and Head Lines of Statutes. Notwithstanding the *dicta* of Jessel, M. R., in *Re Venour's Settled Estates*, L. R. 2 Chy. Div. at p. 525, and L. R. 11 Chy. Div. 499, the authorities and the practice of Parliament show that the marginal notes are not part of an Act of Parliament, and cannot be taken into consideration in interpreting it. But the head lines may be resorted to in order to explain doubtful terms. English, Irish, Canadian and American cases are cited.

Ibid.—24th November, 1883.

Fares of Passengers Travelling beyond Distance Paid for. A Scotch case is noted in which it was decided that where a passenger held a season ticket for the journey between A. and B., and on a certain occasion travelled beyond B. to C., he was bound to pay the excess of the fare from A. to C. over the fare from A. to B.

Ibid.—1st December, 1883.

Copyright in Photographs. In *Nottage v. Jackson*, reported in the *Law Times* of 24th November, it was held that the author of a photograph within the Copyright Act was the person who grouped the figures, superintended the actual process of taking the photograph, and as nearly as possible was the cause of the picture produced; and that the author was not the person who owned the establishment, furnished the capital, etc.

Ibid.—8th December, 1883.

The Privilege of Counsel and Solicitors, continued from 26th May, 1883. The advocate cannot act on both sides even with the consent of the parties. "But does this principle apply," says the learned writer, "where the second fee is given to induce the advocate not to act against

the defendant in a matter wholly outside the litigation in which he is retained for the plaintiff?" The privilege of counsel, as declared in *Munster v. Lamb*, is then discussed.

Ibid.—15th December, 1883.

Preambles to Statutes. Some cases are cited to show that if the language of the Act is not clear the preamble may be resorted to in order to throw light on the enactment.

Ibid.—22nd December, 1883.

Surrender by Tenant to Landlord, as affecting Tenant's Assignee under Bill of Sale. A case of *Clements v. Matthews*, reported in the December number of the *Law Journal*, is discussed. A tenant who had assigned his crops, etc., to the plaintiff by bill of sale surrendered his term to his landlord. It was held that the assignee had an equitable right to the crops, but was liable for expense of cultivating and harvesting.

Ibid.—29th December, 1883.

Contracts incidental to the Statutory Powers of Carriers. In *L. & N. W. R. Co. v. Price*, 52 L. J. Q. B. 754, it was held that the plaintiffs could recover from the defendant a price agreed to be paid for the use of weighing scales which the plaintiffs kept at their station for the weighing of goods carried on their line of railway.

Ibid.—12th January, 1884.

Warranties by Agents on Sales of Horses at Fair. After citing *Brooks v. Hassall*, 49 L. T. N. S. 569, the learned writer proceeds:—"The consequence is that it must now be accepted that a servant of a private owner, as well as of a horse dealer, entrusted with the sale of a horse at a fair may have an implied authority to give a warranty to the purchaser."

Ibid.—26th January, 1884.

"Simplex Commendatio." A recent case of *Smith v. Land, etc., Corporation*, 49 L. T. N. S. 532, is discussed. It was held that where one person induces another to enter into an agreement with him by a material representation which is untrue, it is no defence to an action to rescind the contract that the purchaser had the means of discovering that the representation was untrue.

Ibid.—2nd February, 1884.

Conversion of Chattels by Public Sale. A case of *Delaney v. Wallis* is discussed. One M. stole from the plaintiff's premises a number of sheep and took them to a cattle market where he directed the defendants to sell them for him. The sheep were sold by the defendants who deducted their charges from the purchase money and gave a cheque to M. M. was convicted of the larceny. In this action the defendants were held liable to the plaintiff for the conversion.

Ibid.—9th February, 1884.

Liability of Solicitor for Partner's Misappropriation of Securities. Numerous cases are cited showing the liability of a solicitor for his partner's wrongdoing. *Cleather v. Twisden*, 49 L. T. N. S. 633, is then discussed. In that case the plaintiffs deposited with Parker, one member of the firm of solicitors of which the defendant was another, some bonds payable to bearer. Some of the bonds were realized and their proceeds accounted for. Parker retained the others for safe custody. Letters of the firm referring to the bonds were written, copied in the firm's letter-book, and charged for in the firm's bills of costs. Interest was paid on the bonds by the firm's cheques. Parker absconded, and it was then found that he had sold some of the bonds and appropriated the proceeds. The defendant was entirely ignorant of all the circumstances, but it was held that he was liable for the whole amount misappropriated.

Ibid.—16th February, 1884.

Solicitors' Liens on Documents. A solicitor, though generally entitled to a lien on papers of his client which have come to him in the course of his business, in his professional capacity, until his costs are paid, cannot claim a greater lien than his client is able to create. Hence, a solicitor has no lien on the papers of a company for costs incurred in business which was *ultra vires*. So, where the enforcement of the lien would be the means of frustrating or impeding legal proceedings pending, he cannot in general assert his lien. In *Re Capital Fire Insurance Association*, reported in the *Law Times* of 2nd February, it was held that a solicitor had no lien on the share register and minute book of a company which came into his hands before the commencement of the winding-up, nor on other documents which came into his hands after the presentation of the winding-up petition but before the winding-up order, but that he had a lien on the applications for shares and other documents relating to their allotment, which came into his hands before the presentation of the petition.

Ibid.—23rd February, 1884.

Bills of Sale in Accordance with Statutory Form. Some cases on bills of sale are cited and discussed.

Ibid.—1st March, 1884.

Covenants not to Carry on Trade or Business, concluded in number of 22nd March. A covenant in a lease bound the covenants not to "use, exercise, or carry on, or permit or suffer to be used, exercised, or carried on in or upon the premises, any trade or business of any description whatever." The premises were subsequently converted into a Home for Workingwomen, a charitable establishment, where workingwomen could lodge, take their meals, and use a library, for a small payment. There was no intention of making the venture profitable, and it was, in fact, carried on at a loss. It was held that this was a business within the meaning of the covenant, the word "business" being construed as of wider signification than "trade." Subsequently the promoters altered

their plans and determined to make the Home free, but the opinion of the Court, again taken, remained the same.

Ibid.—8th March, 1884.

Reasonable Conditions in Carriers' Contracts. *The Manchester, etc., R. Co. v. Brown*, 53 L. J. Q. B. 124, is discussed, in which it was held that where a customer agreed to send his goods at a lower rate than the ordinary rate, and thereby free the company "from all liability for loss or damage by delay in transit, or from whatever other cause arising," he could not recover for damage caused by the company's negligence. It was held that the contract was a reasonable one. The learned writer points out that it was not argued nor considered whether the ordinary rates—*i.e.*, the rates twenty-five per cent. higher than the rates charged under the contract—were in fact practically operative, or were positively deterrent and merely illusory.

Ibid.—15th March, 1884.

Levying War. After citing several cases the learned writer proceeds:—"We have thus another authoritative affirmation that levying war against the Crown in the sense of the Act quoted (11 & 12 Vict. cap. 12, sec. 3) consists in forcible opposition, on whatever scale, to the execution of the law and the authority of the Queen's Government; and that where two or more persons agree to carry such an intention into effect, by means of explosives to be used in the destruction of public buildings, the plot itself amounts to an 'overt act,' constituting a contravention of the statute. If so, it appears to us that an explosion so caused would probably be regarded as having been caused by the 'Queen's enemies' in the further sense of the common law doctrine as to carriers, and that, subject to the nature of any special conditions agreed on, railway companies would not be responsible to their passengers for losses so occasioned."

THE
CANADIAN LAW TIMES.

OCCASIONAL NOTES.

ONTARIO.

Supreme Court of Judicature.

COURT OF APPEAL.

ROSE, J.]

[MAY, 1884.

HUGHES v. BOYLE.

Appeal bond—Discontinuance—Liability of sureties.

Leave to appeal from the judgment of Rose, J., post, p. 284, was refused.

Donovan, for the motion.

C. Millar, contra.

High Court of Justice.

QUEEN'S BENCH DIVISION.

[WILSON, C.J., and OSLER, J.A., 23RD MAY, 1884.

In re EBERTS v. BROOKE.

Division Courts—Action on County Court judgment—Prohibition.

The judgment of Galt, J., ante p. 210, was reversed.

Aylesworth, for the appeal.

E. Douglas Armour, contra.

[WILSON, C.J., AND ROSE, J., 29TH MAY, 1884.
WALMSLEY v. MITCHELL.

Verdict by jury—Costs withheld—"Good cause shown"—Rule 428.

In an action of seduction it appeared that the wrong complained of was partly attributable to the culpable neglect of the girl's parents, and the jury gave a verdict for the defendant, but declared that they desired him not to get costs, whereupon judgment was directed to be entered for him without costs.

Held, that good cause was shown why costs should not be given to the defendant within Rule 428, which declares that where an action is tried by a jury the costs shall follow the event, unless upon special application made at the trial for good cause shown the Judge or Court shall otherwise order.

Osler, Q.C., for the defendant.

[26TH MAY, 1884.

HYMAN v. BOURNE.

Chattel mortgage unregistered—Assignment by mortgagor—Right of assignee to dispute mortgage—Adding creditor as party.

The plaintiffs took a chattel mortgage from W., who, on the next day, assigned to the defendant in trust for the benefit of his creditors. The defendant was not a creditor of W., and before any creditor had been informed of the assignment the plaintiffs, who had omitted to register their mortgage, demanded of the defendant the goods comprised by it, which was refused, whereupon this action was brought. Upon the application of the defendant, with the consent of M., a creditor of W., the Master in Chambers ordered M. to be added as a party defendant, in order to test the validity of the plaintiffs' mortgage.

Held, affirming the order of Galt, J., who rescinded the Master's order, that the defendant was not entitled to the order.

H. J. Scott, Q.C., for the appeal.

Gibbons and Aylesworth, contra.

[ROSE, J., 26TH APRIL, 1884.

REGINA v. YOUNG.

Conviction—Depriving of the use of property—32-33 Vict. cap. 21, sec. 110—Jurisdiction of Magistrate.

The defendant sold to C. amongst other things a horse-power and belt, part of his stock in the trade of a butcher, in which he sold a half interest to C. The horse-power had been hired from one M., and at the time of the sale the term of hiring had not expired. On its expiry, M. demanded

it, and C. claimed that he had purchased it. The defendant then employed a man to take it out of the premises where it was kept and deliver it to M., which he did. The defendant was convicted of an offence against 32-33 Vict. cap. 21, sec. 110. The conviction did not state the time or place where the offence was committed.

Held, that there was no offence against that section, and that the conviction was bad; and that it was bad also in not showing the time and place of the commission of the offence.

Held, that a Police Magistrate has no power to try summarily a person accused of an offence against 32-33 Vict. cap. 21, sec. 110.

Remarks upon the frequency with which the criminal law is invoked in aid of civil rights.

W. H. P. Clement, for the motion.

Holman, contra.

ATKINS v. PTOLEMY.

Demurrer—Action for penalty under Municipal Act—Person aggrieved.

The plaintiff was a candidate for the office of Reeve, but was not elected. He brought this action under the Consolidated Municipal Act, 1883, against a deputy returning officer, who was also clerk of the township, to recover a penalty for a contravention of sections 154, 142 and 245 of the Act. There was no allegation of injury to the plaintiff.

Held, on demurrer to the statement of claim, that the plaintiff not showing any injury to himself beyond the injury there might be to him as one of the public was not a person aggrieved within the meaning of that section.

Held, also, that an action for the penalty under that section lies only for a breach of sections 118 to 166 inclusive of the Act.

Lash, Q.C., for the demurrer.

Teetsel, contra.

[9TH MAY, 1884.]

HUGHES v. BOYLE.

Appeal bond—Discontinuance—Liability of surety.

The condition of an appeal bond in which the defendant was a surety was that the appellant would effectually prosecute his appeal and pay such costs and damages as might be awarded in case the judgment appealed from was affirmed. The appellant discontinued the appeal pursuant to R. S. O. cap. 35, sec. 41, which enacts that "thereupon the respondent shall be at once entitled to the costs of and occasioned by the proceedings in appeal, and may either sign judgment for such costs or obtain an order for their payment in the Court below, and may take all further proceedings in that Court as if no appeal had been brought." The Registrar to whom

the matter was referred assessed the damages at the respondent's costs of opposing the appeal.

Held, affirming his finding, that the judgment had been affirmed by the discontinuance, and that these costs had been awarded to the respondent by virtue of section 41.

Quare, as to the meaning of the expression "effectually prosecute."

Donovan, for the appeal.

C. Millar, contra.

[GALT, J., 5TH FEBRUARY, 1884.]

MONTEITH v. WALSH *et al.*

Trespass—Writ of replevin issued after death of defendant—Justifying thereunder—Notice of action against sheriff—Pleading—Demurrer.

An action by an administrator against one Walsh, the Sheriff of the County of York, and his bailiff, for entering the warehouse of Wm. Monteith, the deceased, and taking certain goods. The sheriff justified under a writ of replevin issued at the suit of Walsh, and his bailiff justified under the warrant from the sheriff. The writ of replevin issued after the death of Wm. Monteith. The sheriff and bailiff also pleaded that they had not received notice of action.

Held, on demurrer, that the defence was bad, the writ of replevin being void as issued after the death of Wm. Monteith.

Held, also, that the sheriff and bailiff were not entitled to notice of action.

Macgregor, for the demurrer.

W. Barwick, contra.

CHANCERY DIVISION.

[OSLER, J.A., AND FERGUSON, J., 13TH MARCH, 1884.]

SLATER v. OLIVER.

Preference—Pressure.

A testator directed his executors to pay to his widow a fixed sum in lieu of dower, in pursuance of which they assigned to her a debt due to the estate by the defendant Douglass. Upon her solicitor's advice the widow demanded security from Douglass for the debt and threatened an action if it were refused. Thereupon he made a bill of sale to her of his goods and chattels, book debts, etc.

Held, affirming the judgment of Proudfoot, J., that the bill of sale being given under *bona fide* pressure was valid. *Brayley v. Ellis*, ante p. 202, followed.

[BOYD, C., 2ND APRIL, 1884.]

In re THE MURRAY CANAL; LAWSON v. POWERS.

Marriage with wife's sister—Validity of—Tenancy by the curtesy—Marriage need not be canonical—Married woman under age—Right to devise separate estate—Possession of tenant by curtesy.

Held, that marriage with a deceased wife's sister, apart from 45 Vict. cap. 42, was valid for all civil purposes; that a marriage need not be canonical to entitle the husband to tenancy by the curtesy; and therefore that a man is tenant by the curtesy of undisposed—of land of his deceased wife who was the sister of his first wife.

The Act C. S. U. C. cap. 73, sec. 16, which declared that "Every married woman may make any devise or bequest of her separate property, real or personal * * in the same manner as if she were sole and unmarried," was intended to remove the disability of coverture only, and not that of infancy.

A husband entitled to tenancy by the curtesy, being in the possession of the land, must be considered as occupying it in his rightful character, and cannot set up his possession as against the heirs of his deceased wife.

[7TH MAY, 1884.]

GUNN v. BURGESS.

Chattel Mortgage Act—Purchase of half interest in mare.

The chattel mortgage Act is one which may have the effect of taking away rights of property honestly acquired, and therefore must be construed strictly.

The plaintiff bought one half interest in a mare from G., the bargain being that they were to keep her for breeding purposes and divide the profits equally. The plaintiff paid G. \$50 over the half value in order that G. might take care of the mare till 1st April, 1883. After that date the plaintiff was to take possession and the expenses were to be borne equally. In January, 1883, the sheriff seized and sold the mare to the defendant. She was in foal at the time of sale, and dropped a colt afterwards. The plaintiff notified the sheriff before sale, and the public at the sale, of his claim.

Held, that the plaintiff was entitled to recover one half the value of the mare and the colt, notwithstanding the chattel mortgage Act, for the undivided interest in the mare was not susceptible of a change of possession, and the transaction was therefore not within the mischief of the Act.

BEATTY v. O'CONNOR.

[16TH MAY, 1884.]

Sale under power in mortgage—Surplus—Mortgagee bare trustee of surplus—Account—Costs.

A mortgagee who has made his debt and costs by sale under the power in his mortgage is a bare trustee of the surplus in his hands.

Such a mortgagee was found indebted to the plaintiff in a balance of \$9; but the plaintiff not having proved a demand for and refusal of an account, and the defendant having failed in special matter pleaded by him, the Court gave judgment to the plaintiff for the balance of \$9, without costs.

In re BARWICK & WOOD.

Trustee—Investing trust fund—Purchase of realty.

A settlement authorized the trustees to invest in such estate or securities, whether real or personal, and of what nature and kind soever, as to them should seem best and most advantageous to the beneficiaries.

Held, that the trustees had power to purchase real estate with the trust funds, and could make a good title thereto to a purchaser from them.

[PROUDFOOT, J., JANUARY 4TH, 1884.]

CLARK v. LANGLEY.

Objections to title—Further objections—Jurisdiction of Master.

By an agreement for the sale of certain land, the vendor was to give a marketable title, as to which the purchaser was to satisfy himself at his own expense, and was not to call for any abstract of title, deeds or evidences of title, other than those in the vendor's possession. On a reference in an action by the vendor for specific performance, the defendant filed three objections to the title, having reference to a small portion of the land, which were answered by the plaintiff. Subsequently while the reference was proceeding, the defendant obtained from the Master leave to file five other objections.

Held, reversing the ruling of the Master in Ordinary, that he had no jurisdiction to grant the defendant such leave, but on a subsequent application to the Court the leave required was given.

Moss, Q.C., and H. D. Gamble, for the plaintiff.

MacLennan, Q.C., and Langton, for the defendant.

[14TH MAY, 1884.]

HAMMILL v. HAMMILL.

Will, construction of—"Effects," meaning of.

A testatrix by her will, dated 22nd August, 1879, bequeathed a mortgage to her two sons, the plaintiffs, to be equally divided between them, and also all that portion of their grandfather's estate which they had conveyed to her; she bequeathed to her grandson J. T. H., her gold watch; and then proceeded, "I further direct that the balance of personal property consisting of notes and other securities for money be given to the children of my two sons aforesaid * *"; also, that if there be any other effects possessed by me at the time of my decease, the same be divided equally in value among my grandchildren." She collected the money secured by the mortgage specifically bequeathed and purchased land with it, and died, without altering her will, on 31st May, 1883.

Held, that the intention of the testatrix was not to die intestate as to any portion of her estate, that the word "effects" was not controlled by the word "personal," and therefore that the land purchased with the proceeds of the mortgage passed to the grandchildren.

[FERGUSON, J., 17TH MARCH, 1884.]

ROBINSON v. COOK.

Mortgage of realty and chattels—After-acquired chattels—Chattel Mortgage Act—Equitable estoppel—Creditor assignee—Right to dispute mortgage made by debtor.

S. made a mortgage to the plaintiff of certain lands (describing them) "together with the machinery and foundry apparatus now in use and that may in future be used in the * * buildings situate [thereon] used as a machine shop and foundry downstairs, and as a printing office upstairs." The machinery was described. In the proviso for redemption the property was referred to as "lands and chattels." The mortgage was registered against the land, but was not filed under the Chattel Mortgage Act. Some articles of the machinery were unquestionably fixtures. Other articles were placed on the premises after the mortgage was made.

Held, that, as to the latter articles, the mortgage was valid without filing under the Chattel Mortgage Act; and, as to those articles on the premises at the time the mortgage was made, they were essential parts of the going concerns, the machine shop, foundry, and printing office, and passed under the mortgage of the realty.

One H. C. S. alleged that he was a partner of the mortgagor at the time the mortgage was made and that his half interest had not passed to the mortgagee. It appeared that he was cognizant of the mortgage transaction, and was present when the mortgage was given, but did not disclose his claim to part ownership.

Held, that he was estopped from setting up his title, if any, as against the mortgagee.

The defendant, after this action had been commenced, recovered a judgment against the mortgagor, which remained unsatisfied. He claimed title under a deed of assignment to him in trust for creditors made by the mortgagor, which deed on its face purported to be made subject to the incumbrances on the mortgagor's estate.

Held, that the defendant had the right as a creditor, though not as assignee, to dispute the validity of the plaintiff's mortgage, having set up this defence in his pleadings.

Moss, Q.C., for the plaintiffs.

S. H. Blake, Q.C., for the defendants.

IN CHAMBERS.

[BOYD, C., 13TH DECEMBER, 1884.]

ROBSON v. ROBSON.

Partition or sale—Enquiry as to incumbrances—Petition by purchaser.

Held, that, in proceedings for partition or sale on an order issued under G. O. 640, the Master should ascertain and report what incumbrances affect the land up to the time of the sale, and not merely up to the date of the order for partition.

A report was referred back to the Master to make such enquiries and report, upon the petition of a purchaser.

Meek, for the petition.

Bigelow, for the plaintiff.

[3RD MARCH, 1884.]

In re STUEBING; ANTHERS v. DEWAR.

Administration—Solicitor's commission—G. O. 643—Practice.

In an administration suit in which the estate was insolvent, the total assets being \$72,000, the liabilities \$138,475, and the creditors 180 in number, and in which the commission of the solicitor who acted for all parties was fixed by the Master under G. O. 643 at \$995, eight creditors at the close of the suit, and without notice to the solicitor until fourteen days before moving, applied for an order for the delivery and taxation of the solicitor's bill, instead of the allowance of the commission; on the ground that the commission was excessive.

Held, that the commission was not so exorbitant as to warrant the substitution of a taxed bill, and a probable reduction by that mode of payment, especially as the benefit to the creditors would be trifling.

The scope of G. O. 643 is merely to aid in fixing a solicitor's remuneration, and is only a convenient expedient for fixing costs without taxation.

A very liberal compensation in such cases is not *per se* a reason for reducing the commission, or directing the taxation of a bill in its stead, nor is a low or inadequate compensation a reason for increasing the commission, or directing payment by a taxed bill.

Semble, that in cases affected by this order, any party interested in the estate, who may desire that a solicitor should be paid in the particular matter or suit on the scale of a taxed bill, instead of by commission, should give notice to the solicitor to that effect, and should have the Master note it in his book at the earliest stage possible in the proceedings; but there is no practice authorizing the substitution of a bill of costs for commission at the option of any party.

Bitzer, for the motion.

Hoyles and King, contra.

[9TH APRIL, 1884.

ATTORNEY-GENERAL v. GOODERHAM.

Foreign commission—Names of witnesses—Expert evidence.

In an action to restrain an alleged nuisance caused by the defendants' cattle byres in the City of Toronto, the defendants applied for the issue of commissions to certain cities in the U. S. A. to take evidence on their behalf concerning the cattle byres in those cities, and the means used to destroy or prevent the unpleasant effects thereof. It was admitted that the only point on which the proposed witnesses could be usefully examined was as to whether proper means had been used by the defendants to minimize the objectionable accompaniments or incidents of their business. None of the persons sought to be examined were named on the application, nor was it sworn that such persons could not attend personally at the trial.

Held, upon this state of facts, that the order for the commissions must be refused.

As a rule the Courts discountenance professional or quasi-expert evidence from being brought before them in writing.

G. T. Blackstock, for the motion.

Bethune, Q.C., contra.

[15TH APRIL, 1884.

M'TAGGART v. TOOTHE.

Appearance entered gratis—Lis pendens.

The plaintiff issued a writ of summons and registered a certificate of *lis pendens* upon the lands of the defendant Toothe, who not having been

promptly served with the writ and being anxious to get rid of the action, entered an appearance gratis.

Held, reversing the order of the Local Master at London, that there is nothing in the Judicature Act or rules which interferes with the well recognized practice that a defendant has a right to appear voluntarily, and to anticipate the service of actually issued process. Especially should his privilege to appear gratis be preserved in a case where his property is directly and prejudicially affected by the commencement of the action and the registration of a *lis pendens*.

Hoyles, for the appeal.

Rae, contra.

[BOYD, C., 5TH MAY, 1884.]

JOHNSTON v. WILSON.

Security for costs—Further security—Defendant in issue—Rule 429.

Executors made application for probate. A caveat was entered by one of the next of kin, A., resident out of the jurisdiction, and an issue was directed to be tried, involving questions of mental capacity, undue influence, etc., in which the executors were plaintiffs, and the next of kin was defendant. The learned Judge of the Surrogate Court ordered the defendant to give security for costs in the sum of \$200. This order was complied with. Subsequently the matter was transferred to the Chancery Division of the High Court, but at the time of transfer nothing was said about further security.

R. S. Cassels, for the plaintiffs, now moved for further security.

Hoyles, for the defendant, contra.

Held, affirming the order of the Master in Chambers, that the plaintiffs were entitled to further security to the extent of \$200 to be given within a limited time, and in default to have the defence struck out.

[GALT, J., 21ST APRIL, 1884.]

MILLETTE v. LITTLE.

Privilege of witness—Husband and wife—Answers tending to criminate.

In an action of libel against a husband, as the writer of libellous articles, and as editor of a newspaper in which they were printed, and against his wife as owner and publisher of the newspaper, upon examination after issue joined, the husband refused to answer questions as to the ownership of the newspaper, on the ground that his answers might tend to expose his wife to a criminal prosecution for publication of the libels, and the wife refused to answer questions as to the authorship of the newspaper articles

in question, and as to the editing of the newspaper on the like grounds as to her husband.

Held, that the defendants were justified in their refusals.

[ROSE, J., 12TH MAY, 1884.]

FEDERAL BANK v. HARRISON.

Counter-claim—Striking out.

An action against the defendant on his bond as surety for H. & McT. for the amount due the plaintiffs by H. & McT. on their banking account with the plaintiffs. Counter-claim by the defendant against the plaintiffs and H. & McT., alleging that the defendant is liable only as such surety, and that the plaintiffs ought to resort to H. & McT. to enforce payment from them, and that H. & McT. should be ordered to pay the amount and indemnify the defendant. The counter-claim was not based upon any agreement, but upon the relationship of the parties as creditors, principal and surety.

Held, affirming the order of the Master in Chambers, that the counter-claim was bad and should be struck out.

Holman, for the plaintiffs and defendants by counter-claim.

Aylesworth, for the defendant.

[30TH MAY, 1884.]

In re YOUNG v. MORDEN.

Division Court—Prohibition—Increased jurisdiction.

In an action in the 7th Division Court of the County of Hastings on a promissory note for \$200, in which the learned Judge awarded judgment for \$207.17, being the amount of the note and accrued interest, prohibition was granted.

Shepley, for the motion.

Aylesworth, contra.

[THE MASTER IN CHAMBERS, JANUARY, 1884.]

MONTEITH v. WALSH *et al.*

Trespass to premises of deceased person—Pleading set off—Insolvent estate—Order for administration—Pleading—Striking out defence.

To an action by an administrator against Walsh for entering the warehouse of Wm. Monteith, the deceased, and taking certain goods, the defendant Walsh pleaded a set off of a large debt due to him by the

deceased. The assets of the estate of Wm. Monteith were insufficient to pay the debts.

Held, that the defence was bad, and should be struck out, as the defendant was bound to rank with other creditors *pari passu* under the R. S. O. cap. 107, sec. 30, but

Semble, that the plaintiff should have replied the insolvency of the estate and not have moved to strike out the defence.

An order for the administration of the estate of Wm. Monteith had been made in the Chancery Division, of which the defendant had notice before he pleaded.

Held, that on this ground, also, the defence should be set aside.

MacGregor, for the plaintiff.

W. Barwick, for the defendant.

[12TH MARCH, 1884.]

FRITH v. RYAN.

Affidavit on production—Cross-examination on.

Held, that G. O. 268 is superseded by Rule 283; and that the latter rule does not authorize the cross-examination of a party upon his affidavit on production filed, and such an examination cannot be ordered; but the officer of a corporation may be examined on his affidavit on production under Rule 226.

A. J. Williams, for the motion.

[3RD MAY, 1884.]

NEW YORK PIANO CO. v. STEVENSON.

Death of defendant—Order of revivor—Notice of trial served therewith—Time running concurrently.

The original defendant having died, the plaintiffs issued an order of revivor on 22nd April, and served it on the defendants by order on the same day, and with it a notice of trial for the 5th May.

Held, that as the order of revivor would be confirmed by the lapse of twelve days upon the 4th of May, the notice of trial for the 5th of May was regular.

Holman, for the motion.

Hoyles, contra.

[23RD MAY, 1884.]

PERRY v. PERRY.

*Ontario Mortgage Act, 1884—Notice of sale—Action on covenant—
Simultaneous service of writ and notice.*

The plaintiff drew up a notice of sale under the power in his mortgage dated 2nd May, and issued a writ in an action on the covenant in the mortgage on 3rd May and caused the notice and writ to be served together upon the mortgagor, without having obtained an order permitting him to commence the action.

Held, that the proceedings in the action must be stayed, the object of the Act being to stay all proceedings while the notice of exercising the power of sale is current, and it made no difference that the writ was issued before the notice of sale was served.

Milligan (*Mulock, Tilt, Miller & Crowther*), for the defendant.
Malloy, for the plaintiff.

NEW BRUNSWICK.

In the Supreme Court.

[JUNE, 1883.]

HOTHAM v. PHILLIPS.

*Money paid—Illegal Contract—Liquor bought for purpose of sale in violation
of Canada Temperance Act—Onus of proof.*

The plaintiff purchased and paid for liquor at the request of the defendant, and sent it to him in the County of C. where "The Canada Temperance Act, 1878," was in force. In an action to recover the money paid, it was proved that the plaintiff knew the defendant was in the habit of selling liquor, and that he knew the purpose for which the liquor in question was bought—(not stating what the purpose was).

Held, That it did not necessarily follow that the plaintiff knew the defendant intended to sell the liquor in violation of the law; and that the burden was on the defendant to shew that the plaintiff knew that it was to be so sold.

CHAPMAN v. THE DELAWARE MUTUAL INS. CO.

Policy of Insurance—Seal—Countersigning by agent—Pleading—Non est factum—Waiver—Admissions by President of Company.

A policy of insurance of a Foreign company, sealed with what purported to be the corporate seal and signed by the President, declared that it should not be valid unless countersigned by R., the company's authorized agent at St. John, N. B. The plaintiff agreed with R. to effect an insurance on a vessel, and paid him the premium, and R., at the plaintiff's request, sent the policy to C., but omitted to countersign it.

Held, per Allen, C.J., Wetmore and King, J.J., (Weldon, J., dissenting), (i) That the countersigning might be waived, and that R. had waived it by receiving the premium and issuing the policy; (ii) That this objection to the policy was available under the plea of *non est factum*.

The holder of a policy of insurance issued by R. as the agent of a foreign company went to what purported to be the head office of the company in Philadelphia to enquire about payment for a loss under the policy, and conversed with H., a person there, who was represented to him as the President of the company, and who produced a paper which he said was a copy of the policy, and spoke about the loss and payment of it by R., the company's agent.

Held, that this was evidence that H. was the President of the company, and that his declaration was evidence of the agency of R.

CHAPMAN v. THE PROVIDENCE WASHINGTON INS. CO.

Policy of insurance—Proof of agency—Con. Stat. cap. 46. sec. 16—Prior insurance—Meaning of words "premises hereby assured"—Warranty not to load more than registered tonnage with stone or ore without consent of agent—Verbal consent of agent—Loading with Phosphate rock—Vessel—Registered owner—Equitable owner—Evidence—Statement to underwriters as to nature of interest.

A policy of insurance of a foreign corporation declared that it should not be valid unless countersigned by R., the company's agent at St. John, N. B. In an action on the policy, proof that it was countersigned by R. as agent, and issued to the plaintiff on his application, and that he had previously dealt with R. as agent of the company, and received a policy from him purporting to have been issued by the company and countersigned by R. as such agent, is sufficient evidence under the Con. Stat. cap. 46, sec. 16, that R. was the accredited agent of the company, and that the policy was executed by them.

Plaintiff insured \$5,000 on a vessel valued in the policy at \$40,000. The policy stipulated that if the assured had made any prior insurance, the underwriters should be answerable only for so much as such prior insurance was deficient towards fully covering the premises thereby insured. The

plaintiff's interest in the vessel amounted to \$15,000, and he had prior insurance to the extent of \$5,350; there was also insurance, by other persons, on the freight and disbursements of the vessel, and on advances made to the plaintiff.

Held, (i) That the words "premises hereby insured" meant the plaintiff's interest in the vessel; and that as the value of his interest exceeded the amounts both of the prior insurance and of the sum insured by the policy sued on, he was entitled to recover the whole of the latter sum.

(ii) That the insurance on freight &c., did not come within the prior insurance clause in the policy.

By the terms of a policy of insurance, a vessel was warranted not to load more than her registered tonnage "with stone, marble, lead, ores, or bricks," without the consent of the agent of the underwriters.

Held, per Allen, C.J., Wetmore and King, JJ., (Weldon, J. dissenting.) that a verbal consent of the agent to load beyond the registered tonnage of the vessel was sufficient.

A vessel was loaded with a substance known in commerce as phosphate rock, or phosphate, which was used for fertilising purposes; and scientific witnesses were not agreed as to a definition of it.

Held, per Allen, C. J., Wetmore and King, JJ., (Weldon, J. dissenting). that it was a proper question for the jury whether it was known to the commercial world as "stone" at the time the policy issued—there being a warranty against loading with stone beyond the vessel's registered tonnage.

Plaintiff being the registered owner of one-fourth of a vessel, and also the equitable owner of one-eighth, insured \$5000 upon her, the policy not specifying his interest. He admitted on cross-examination that he had prior insurance on the vessel, but stated that it was upon his one-eighth interest.

Held, that he was entitled, on being afterwards called to rebut the defendants' evidence, to explain the circumstances connected with the prior insurance.

Quare, whether he should have been allowed to state that he told the underwriters, at the time of effecting the policy sued on, that he was insuring the share of which he was the registered owner.

MANITOBA.

In the Queen's Bench.

VIVIAN v. SCOBLE.

Further directions—What may be read on—Principal and agent—Sale of land by agent—Right of principal to deeds—Account.

Held, that, on a hearing on Further Directions, only the decree, Master's report, and any intermediate orders may be read, but for the purpose of disposing of the question of costs the defendant may read his answer.

The plaintiff employed the defendant as his agent to sell lands and agreed to pay him a commission of twenty per cent. The Master found, on taking the accounts, that there was a balance due from the defendant to the plaintiff. The deeds relating to the lands had been deposited in Court.

Held, on hearing on Further Directions, that the plaintiff was entitled to delivery of his deeds, and that he was entitled to proceed to collect moneys due on sales and unpaid without giving any security; the defendant being left to his right to an account and payment to him by the plaintiff for his commission if entitled thereto.

In this suit a decree was made by consent, directing certain accounts to be taken between the plaintiff and the defendant, his agent for the sale of lands (see ante pp. 256, 257), and a balance was found due from the defendant to the plaintiff of \$6,459.94. The defendant claimed that there were large sums of money still outstanding upon the sales made by him, and that there was a large sum still due to him as commission upon sales, and he claimed the right to retain the deeds and documents relating to the lands in question, which had been deposited in Court at the hearing of the cause, until the balance of the moneys outstanding had been collected, and his commission paid. He also claimed that his authority as agent of the plaintiff was coupled with an interest, and was irrevocable.

A decree on Further Directions was made after the Master had made his report, and that decree the plaintiff now re-heard upon objections which appear in the judgment. Counsel for the defendant claimed the right, on the re-hearing, to read the pleadings and an agreement to which in his answer he craved leave to refer.

Howell and Hough, for the plaintiff.

Killam, for the defendant.

The judgment of the Court was delivered by

TAYLOR, J.—This is a rehearing at the instance of the plaintiff of the Decree on Further Directions, pronounced on the 4th October, 1883. The portions complained of are the third, fourth and fifth paragraphs.

Before the argument a question arose as to what could be read or referred to on a hearing on Further Directions. Counsel for the defendant insisted on his right to read the pleadings, and an agreement to which in his answer the defendant craved leave to refer. The reference in the answer to this agreement is sufficient in form to make it part of the answer.

On a question of costs a defendant may read his answer, although it cannot, when replication has been filed (except by consent), be read as evidence on his own behalf upon the matters in dispute. The practice is thus stated by Mr. Daniell: "In disposing of the question of costs however, the Court will permit the defendant's answer to be read on his own behalf."

Under G. O. 147, "At the hearing of any cause, or of any Further Directions therein, affidavits of particular witnesses, or affidavits of particular facts or circumstances may be used by consent, or by leave of the Court, or such consent may be given on behalf of persons under disability, with the approbation of the Court." This is an exact copy of the Ontario G. O. 176.

These orders are merely extensions of the Imperial Act, 13 & 14 Vict. cap. 35, sec. 28, which provided as follows: "And be it enacted that, notwithstanding any rule or practice of the said Court to the contrary, it shall be lawful for the said Court at the hearing of any cause, or of any Further Directions therein, to receive proof by affidavit of all proper parties being before the Court, and of all such matters as are necessary to be proved for enabling the said Court to order payment of any moneys belonging to any married woman, and of all such other matters not directly in issue in the cause, as in the opinion of the said Court may safely and properly be so proved." Except under these provisions, it appears that nothing can be made use of at a hearing on Further Directions except the decree and Master's report, with any intermediate orders or certificates.

Mr. Daniell says, upon the hearing on further consideration, the Court will make such further orders in the cause as upon reading the Chief Clerk's certificate appears to be consistent with the justice of the case as it stands upon the evidence and certificate: Dan. Pr. p. 1229. Upon p. 1236 (note E) it is said, "The brief of each party on further consideration will consist of the decree or order made at the former hearings, the Chief Clerk's certificate and any intermediate orders and certificates."

On this point a reference may also be made to *Gould v. Burritt*, 11 Gr. 234; *McGill v. Courtice*, 17 Gr. 271, and *Downey v. Roaf*, 6 P. R. 89.

Counsel for the defendant contended that the original decree having directed that certain books, papers and documents should be brought into Court, to remain open to the inspection of both parties, subject to the

further order of the Court, no intelligent disposition can now be made of them upon reading the decree and report; that to dispose of this question the pleadings and agreement mentioned in the answer must be referred to.

It would appear, however, that there can be no difficulty in dealing with this upon the decree and the finding of the report.

The decree made at the hearing declares that the plaintiff is entitled to an account of the dealings or transactions of the defendant with the lands in the Bill of Complaint set forth. The Master is directed to take an account of all sums of money received by the defendant, as agent for the plaintiff, in regard to the sale of the lands, and to enquire when such were received; also, to take an account of the expenses properly incurred by the defendant in connection with the sales, and of what moneys were paid by the defendant to the plaintiff out of the proceeds of the sales. The decree then went on to order that the balance found due to the plaintiff upon the taking the accounts should be paid into Court, less the defendant's commission of twenty per cent. on the moneys actually received by him.

The result of the taking of the accounts under this decree is that the Master has found a balance to be due from the defendant to the plaintiff of \$6,459.94.

The objections to the third, fourth and fifth paragraphs of the decree made by the plaintiff are the following:—He says that the decree does not properly declare, and should not declare, as it does in the third paragraph, that the agency of the defendant is revoked; for the plaintiff has power, independently of any decree, to revoke the authority given his agent, and he has revoked it. He also objects that the Court should not have declared, as it does in the fourth paragraph, that the plaintiff shall have the exclusive right to collect the moneys and debts, because they are his own moneys, and he has a right to collect them without any such declaration or provision. He further objects to the provisions of these paragraphs that the agreement between the parties, dated 2nd January, 1882, shall stand as to the right and claim of the defendant to commission upon moneys collected after the 12th October, 1882, and that the plaintiff shall pay one-fifth of the collection, after deducting expenses, to the defendant, and that the plaintiff must give security in the sum of \$10,000 for the faithful payment of whatever the defendant may be entitled to receive. The defendant is satisfied with the decree as it stands, but insists that, if varied as asked by the plaintiff, then that the second paragraph which orders the delivery to the plaintiff of the deeds, documents, writings, plans and papers relating to the sale of the property in general should be struck out, and the defendant entrusted with the papers for the purpose of collecting the moneys still unpaid under them.

The decree in my judgment should have contained no such provisions as those complained of, but should simply have ordered payment of the \$6,459.94 (though even that was not necessary, as the decree at the original hearing contained a sufficient order for payment), for delivery of the deeds to the plaintiff, and for payment of costs by the defendant.

The decree at the hearing was a consent decree, and was made on the footing of the defendant being the agent of the plaintiff, and gives him a commission upon the money actually received by him. The Master has found a balance due from the agent to the plaintiff, his principal, and the plaintiff has a perfect right to terminate the agency at any time he pleases, and he says he has done so. At the hearing it was very well to order that the documents were to remain in Court subject to further order, for at that time the accounts were not taken, and the defendant claimed a large balance due to him for which he might have a lien upon the deeds and papers. Any question of that kind has now been disposed of, for the defendant has been found largely indebted to the plaintiff. Why then should the plaintiff not at once receive the deeds and papers which relate to his own property, and to sales made for him by his agent. That the defendant makes a claim to one-fifth of the proceeds seems no reason why the plaintiff should not get possession of his own papers, or why he should give way to the defendant. Even if the defendant is entitled to this one-fifth, as to which there is a question, the plaintiff is entitled to four-fifths, and the balance of interest is therefore largely in his favour.

That the agreement relied on described the defendant as agent, and that he has consented to a decree for an account against him as agent, and that a large balance has been found due from him, are quite sufficient reasons for the plaintiff getting his papers, and for being allowed to proceed to collect moneys due to him without his being required to find security.

If the defendant has a vested right in the one-fifth interest which he claims he has, he can take such steps as he may be advised hereafter to obtain an account and payment from the plaintiff.

The decree should be varied therefore as asked.

PRINCE EDWARD ISLAND.

In the Supreme Court.

[PALMER, C.J., AND HENSLEY, J., 24TH JANUARY, 1884.]

In re PATRICK CONNOLLY.

Canada Temperance Act—Defendant as witness—Questions tending to criminate—Refusal to answer—Privilege of witness.

Section 123 of the Canada Temperance Act, 1873 (which enacts that "On the trial of any proceeding, matter or question, under any of the Acts in the 112th section of this Act mentioned or under this Act, the person opposing or defending, or the wife or husband of such person opposing or defending, shall be competent and compellable to give evidence in such proceeding, matter or question") does not take away the privilege of the defendant when under examination as a witness to refuse to answer questions tending to criminate him.

In a prosecution before the Stipendiary Magistrate of Charlottetown for an alleged breach of the Canada Temperance Act, 1878, the accused was called as a witness for the prosecution, and was asked whether he had sold liquor between two certain dates. He refused to answer on the ground that his answer might subject him to a criminal prosecution. For his refusal the Magistrate committed him to gaol for contempt of Court. The defendant was now brought up on a writ of *Habeas Corpus*, and an application was made for his discharge.

Hodgson, Q.C., for the applicant.

Peters, contra.

PALMER, C.J.—The applicant has been prosecuted for an alleged breach of the Canada Temperance Act, 1878.

On the hearing of the cause before the Stipendiary Magistrate for this city, during the present month, the applicant (the defendant) was called to the witness box and questioned (under the 123rd section of the Act) as to whether he had sold spirituous liquor within a certain period named to him. The 123rd section is as follows:—"On the trial of any proceeding, matter or question under any of the Acts in the 112th section of this Act

mentioned, or under this Act, the person opposing or defending, or the wife or husband of such person opposing or defending shall be competent and compellable to give evidence in such proceeding, matter or question."

The defendant refused to answer, and claimed the privilege of a witness, on the ground that his answer might tend to criminate himself, and render him subject to a penalty, or imprisonment; and persisting in his refusal, he was committed by the Stipendiary Magistrate for contempt of Court.

The case was very fully argued before us on the 16th instant, the defendant's Counsel contending under the well established maxim, *Nemo tenetur seipsum accusare*, that the defendant, although submitting to be sworn, comes under this maxim, and that the section just recited has not taken away his privilege; while on the part of the prosecution, it is contended that the whole object and intention of the section was to compel the defendant to disclose, irrespective of privilege, whether he was guilty of a breach of the Act or not. Upon the argument numerous authorities and cases argued in the different Courts arising under the legal maxim above quoted were cited, and brought to the notice of the Court, in which very deep learning and research are evidently displayed. Many of these authorities will be referred to by Mr. Justice Hensley in his judgment rendering it unnecessary for me to refer to them, with one or two exceptions.

These authorities show that the very ancient privilege of a witness claimed by the defendant has never been lost sight of in British tribunals of justice; it has been jealously preserved from age to age, and retains its full force to the present day. Before it is refused the Courts must be satisfied, beyond all reasonable doubt, that the Legislature intended to take it away; and to be satisfied that it is taken away, the Courts look for express language of the Legislature. This is very clearly shown by the case of the *Duke of Newcastle v. Morris*, L. R. 4 H. L. 661; *Regina v. Payne*, L. R. 1 C. C. 349; *Boyle v. Wiseman*, 24 L. J. Ex. 160; *Rex v. Buttle*, L. R. 1 C. C. 248, and many other cases which may be referred to. It has been argued on behalf of the prosecution that, although the privilege contended for is a very ancient one, yet the Parliament of Canada has power to take it away; doubtless it has if it does so in unmistakeable language. It was also contended that under the 123rd section in question, if the witness or party has the right to offer his own evidence in his own behalf, he would be subject to cross-examination, and then the prosecutor would be allowed to ask him as to his selling liquor in breach of the Act; this question, it is true, might be asked, but still the privilege would prevail, and the party might decline to answer. It frequently happens that the Legislature, in cases of this nature, to place matters beyond all doubt, enact in express words that the witness or party shall disclose the facts inquired into, even although his answers might tend to criminate himself—and, in some instances again the Legislature provides that in such case the answers shall not be allowed to be used against the person in any Court or prosecution to his prejudice; but the authorities nevertheless show that the absence of a provision of this kind is not to be accepted as an intention on the part of the Legislature to deprive the person of his ancient common law

privilege; to do so the Legislature must strike in clear language at the very privilege, and manifest its intention to take it away.

To give expression to an opinion individually on the question I should say it was not unlikely that the person who penned the Act supposed that the 123rd clause would be sufficient to compel the defendant or witness to answer, *privilege or no privilege*, although it is worthy of remark that in section 89 (a clause relating to the polling of votes) the witness or party is compelled to answer whether he criminate himself thereby or not; his privilege being taken away by the *express words* of the section. This certainly would indicate that the absence of similar words in the 123rd section was not from inadvertence; but, whatever room there would be for one's imagination as to the intention of the framers of the Act, the Court can easily judge of the intention by those principles of construction which are now well defined, and enjoined on the Judge in construing doubtful enactments of the Legislature. Keeping in view therefore the principles of the common law as applicable to this subject, and having a due regard to the judicial decisions before us, some emanating from the highest tribunal in the realm, I hold that the appellant is entitled to the privilege contended for in this case, and that he must be discharged from custody.

HENSLEY, J.—This is an application on the ground of illegality to bring up, with a view to his discharge from imprisonment by this Court, Patrick C. Connolly, of Charlottetown.

It appears from the affidavits and other papers filed that the applicant had been summoned before Rowan R. Fitzgerald, Esquire, Stipendiary Magistrate of the City of Charlottetown, for having sold spirituous and intoxicating liquors contrary to the provisions of the "Canada Temperance Act, 1878." He was also subpoenaed by the prosecution as a witness on its behalf, and, when placed in the box and sworn, this question was put to him: "Between the 1st day of December last past and the 27th day of December last past, did you sell any spirituous and intoxicating liquors?" which question he declined to answer on the ground, as he stated, that "he believed it would tend to criminate him," and thereupon he was committed to gaol for refusing to answer. He contended that he was justified in refusing to answer such question as put, on the ground advanced by him that the Stipendiary Magistrate had no power to compel him to answer such question, and, consequently his committal was illegal and beyond the power, authority and jurisdiction in that respect of the Stipendiary Magistrate.

The Canada Temperance Act has, amongst other provisions, the following in its 123rd section:—"On the trial of any proceeding, matter or question under any of the Acts in the 112th section of this Act mentioned, or under this Act, the person opposing or defending, or the wife or husband of such person opposing or defending shall be competent and compellable to give evidence in such question, matter or proceeding."

If it had not been for this provision, as the law previous to the passing of this Act of 1878 stood, the party defendant could not have been called or examined on any point connected with the case.

Until the Island Act of 16 Vict. cap. 12, which is a reproduction of the British Act, 14 & 15 Vict. cap. 99, was passed, neither plaintiff nor defendant could be examined as witnesses on either side in a pending suit, civil or criminal.

That Act greatly changed that state of things, and ordained by its 12th section that "On the trial of any issue joined, or of any matter or question, or on any inquiry arising in any suit, action or other proceeding, in any Court of Justice in this Island, or before any person having by law or by consent of parties, authority to hear, receive, or examine evidence therein, the parties thereto, and the persons in whose behalf any such suit, action or other proceeding may be brought or defended, shall, except as hereinafter excepted, be competent and compellable to give evidence, either *viva voce* or by deposition, according to the practice of the Court, on behalf of either or any of the parties to the said suit, action or other proceeding."

Section 13 was as follows:—"Nothing herein contained shall render any person who, in any criminal proceeding, is charged with the commission of any indictable offence, or any offence punishable with summary conviction, competent or compellable to give evidence for or against himself or herself, or shall render any person compellable to answer any question tending to criminate himself or herself, or shall, in any criminal proceeding, render any husband competent or compellable to give evidence for or against his wife, or any wife competent or compellable to give evidence for or against her husband."

The effect of these two sections taken together was evidently this, that whilst the parties to a suit were admitted to give evidence, it was as witnesses, and was under the rules and protection which were extended by law to all witnesses in common. What were the rules and protection extended by law to witnesses contemplated by this 13th section? In the 8th edition of *Powell on Evidence*, an eminently practical and reliable book (1875), p. 108, Privilege, Rule 1, they are thus succinctly stated:—"A witness is not compellable to answer any question tending to criminate himself. That is on the principle *nemo tenetur seipsum prodere*, a witness whether a party to a suit or not cannot be compelled to answer any question, whether put *viva voce* or in the form of a written interrogatory, the answer to which may expose or tend to expose him to a criminal charge, penalty or forfeiture of any kind. This rule is recognized and expressed by the Law of Evidence Amendment Act, 1851 (the same as our Act), which after making the parties to civil actions and suits competent and compellable witnesses on behalf of either party, enacts that nothing in the Act shall render any person compellable to answer any question tending to criminate himself or herself."

It is well established that this privilege to refuse to answer is one which can be claimed only by the witness himself, and that he may refuse or waive his privilege and answer at his peril.

And here it may be well for the purpose of an intelligent conclusion to compare the provisions in respect of giving evidence of the General Evidence Act, 16 Vict. cap. 12, and this "Canada Temperance Act, 1878."

The latter ordains that the defendant "shall be competent and compellable to give evidence in such matter or proceeding."

The Evidence Act, 16 Vict. cap. 12, sec. 12, says that "except as herein-after excepted he shall be competent and compellable to give evidence." The general terms of enactment are the same, but in the "Canada Temperance Act, 1878," the clause "except as hereinafter excepted" does not appear. What is the effect of this? Would the words of the 12th clause of the General Evidence Act, 16 Vict. cap. 12, if unprotected or unrestrained by the 13th clause, have made not only the parties to a suit witnesses, but have cast them before a Court without the protection extended to other witnesses, and have compelled them to be sworn and then allowed them to be probed and forced to confess or deny all the crimes of which they might be supposed or suggested to have been guilty?

In the case of *Regina v. Payne*, L. R. 1 C. C. 349, Chief Justice Sir Alex. Cockburn, that eminent and liberal-minded Judge, who, however, was pronouncing not only his own opinion but the unanimous opinion of his colleagues on the bench, said, "We are all agreed that the exception in 14 & 15 Vict. cap. 99, sec. 3, was introduced to prevent any possibility of its being thought that the law as it had existed from the earliest time was altered by this Act." In effect, he declared that the previous section 12 as it stood would not have altered the law protecting witnesses from criminating themselves, but that the Legislature were so jealous of that privilege that they wished to guard against the possibility of misconstruction in their intention. And from the note to *Taylor on Evidence*, p. 1133, it would appear that this proviso or saving clause was, as some thought, injudiciously introduced into the English Act (which formed the model of our own) by the House of Lords at the pressing instance of Lord Truro. Lord Campbell, whose opinion on such a point, as Lord Chief Justice of England, whether expressed on the Bench or in his place in the House of Lords, must be entitled to respect in determining the meaning and construction of an Act, declared that "It was calculated to raise doubts where none should exist. By the general law of the land every witness is protected from answering questions, where the answer would tend to criminate himself, or to expose him to any penalty, forfeiture or ecclesiastical censure, and as the Act simply makes parties witnesses, it is obvious that without any special enactment they might have claimed the same protection as all other persons under examination."

It is apparent that the words making defendants witnesses under the General Evidence Act, 16 Vict. cap. 12, and The Canada Temperance Act, are identical. If so, why should the Common Law forbidding criminating examination exist in one case and not in the other? Is it because in one case it might lead to possible prosecution, and in the other it might lead to

possible condemnation? The inquiry in both cases is equally contrary to the spirit of British Law.

And here it may be observed that this principle of the Common Law is not a mere morbid spirit of false sympathy with one charged with the commission of a crime, but is a solid, sensible conclusion with regard to the probable value of evidence obtained under such circumstances, and the probability of the inducement to the other crime of perjury, which it would prevent in every case. The principle really requires but little explanation. It is founded on the known infirmities, unfortunately, of human nature, which is too often too weak to be restrained by the religious and moral obligations of an oath, when tempted and solicited in a contrary direction by temporal interest, or the desire to escape present punishment. The party placed in the box has to select between two crucial alternatives: confess, and be punished for the offence charged, or deny it and commit the, perhaps, graver offence of perjury, from prosecution for which he may possibly escape. The value of testimony under such circumstances is evidently but very little, and in view of this was undoubtedly settled the Common Law principle now under discussion.

There is no doubt, however, that it is in the power of the Legislature or Dominion Parliament or any British Parliament to take away this or any other protection or privilege recognized or existing at Common Law, but it must be done by open, manly, and expressed words, not dangerously left to Judges to arrive at such a conclusion from inferences or finely drawn deductions based on such premises as the apparent intention and mind of the Legislature.

This principle is enforced and illustrated by various cases on other points decided.

In *Regina v. Buttle*, L. R. 1 C. C. 251, Baron Martin said:—"We cannot assume that the Common Law's protection to the witness is taken away unless the Legislature clearly says so."

In the case of the *Duke of Newcastle v. Morris*, L. R. 1 H. L. 661, where the question was whether as the Peers were, in general terms, made subject to the Law of Bankruptcy, their Common Law privilege of freedom from arrest was thereby taken away, it was determined that general words would not by implication take away such a privilege existent at Common Law, but to do so, it must be struck at by "express words in the Statute," which Lord Hatherley declared he apprehended "to be a safe and sound conclusion"; and there are other cases to the same effect.

The various Legislatures have frequently passed Acts specially taking away such Common Law privileges in express words, and this fact is certainly a strong ground for holding that where an Act is not so special or definite, the intention of the Legislature is wanting.

But such regard have the Legislatures to the old Common Law principle in this respect, that almost invariably where Statutes compel parties to answer in a criminatory way they protect them by certificates from the consequences.

Thus in the English Corrupt Practices at Elections Act, 1863, sec. 3, it was enacted that no witness should be excused from answering questions relating to corrupt practices at an election, though the answer would tend to criminate him, provided that if he the witness answered all the questions put to him, he was to be entitled to a certificate to the effect that he was required to and did answer questions criminating or tending to criminate him, and in the event of any proceeding being afterwards taken against him under any of such acts, the Court was to stay all proceedings on the production of such certificate, &c. Even in India, under the 132nd section of the Indian Evidence Act, where that which in England is an exception, is there the general rule, it is enacted that a witness shall not be excused from answering criminatory questions, but at the same time it is subject to a proviso that "no such answer which a witness shall be compelled to give shall subject him to arrest or prosecution, or be proved against him in any criminal proceeding, except a prosecution for giving false evidence by such answer."

There are other instances of the same kind and to the same effect.

It will be observed that under these latter provisions the value of evidence is established. True the party is compelled to criminate himself, and he is under the obligation of his oath and the express words of the Statute to do so, if necessary, but there is an absence of the other opposing element or interest to induce him to answer falsely, because he is protected by certificate, if he answers fully and truly, from any consequential punishment on account of his confessing the crime or offence interrogated upon.

But did the Parliament of the Dominion intend by this section, 123, to take away the Common Law protection to parties when placed in the position of witnesses? Were they unmindful of the necessity where they wished or intended to do so of declaring it in plain and explicit words? I think not. In the very Act under consideration, in sec. 89, when providing for the machinery of Court to enquire into corrupt practices at elections, the following appears:—"No person shall be excused from answering any question put to him in any action, suit, or other proceeding in any Court, or before any Judge, Commissioner, &c., touching or concerning any polling of votes under this Act or the conduct of any person thereat, or in relation thereto, on the ground of any privilege or on the ground that the answer to such question will tend to criminate such person, but no answer given by such person claiming to be excused on the ground of privilege, or on the ground that such an answer will tend to criminate himself, shall be used in any criminal proceeding against such person, other than an indictment for perjury, if the Judge, Commissioner, or President of the Tribunal shall give to the witness a certificate that he

claimed the right to be excused on either of the grounds aforesaid, and made full and true answers to the satisfaction of the Judge, Commissioner, or Tribunal."

Here the Legislature plainly declared in that instance, their intention to take away the Common Law protection to witnesses as to disclosure, but they substituted a new protection of indemnity. In the 123rd section now under consideration, they make no such declaration. Is this Court by implication to make the declaration which the Legislature have abstained from making? In my opinion they would not be justified either by law or precedent in doing so, but if the Legislature really so intended, or desire to amend the Act in that respect, it is open for them to do so, but it must be done in clear and direct terms. I therefore think that this writ of *habeas corpus* will lie, and that the applicant, P. C. Connolly, is illegally imprisoned, and I direct that forthwith he be discharged from custody.

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APPEALS FROM STIPENDIARY MAGISTRATES IN THE NORTH-WEST TERRITORIES.

SOME interesting points in constitutional law are suggested by the provisions of the "North-West Territories Act, 1880," (a) with regard to appeals from the stipendiary magistrates.

Section 77, with regard to criminal cases, is as follows :—
"A person convicted of any offence punishable by death may appeal to the Court of Queen's Bench of Manitoba, which shall have jurisdiction to confirm the conviction, or order a new trial ; and the mode of such appeal and all the particulars relating thereto shall be determined from time to time by ordinance of the Lieutenant-Governor in Council."

Section 88 deals with civil cases and is as follows :—"Any person feeling himself aggrieved by the decision of any stipendiary magistrate in a claim, dispute, or demand, under the second sub-section of the 85th section of this Act may appeal to the Court of Queen's Bench of Manitoba, which shall have jurisdiction to confirm the decision or order a new trial, and the mode of such appeal and all particulars relating thereto shall be determined from time to time by ordinance of the Lieutenant-Governor in Council."

(a) 43 Vict. cap. 25.

These sections would appear to bring up a new point under the British North America Act. The extent to which the Parliament of Canada can regulate the administration of Justice in the Provinces, either by extending the jurisdiction of the Provincial Courts or by establishing additional Dominion Courts, and its power to regulate procedure, have, it is true, been pretty thoroughly discussed; but in the present case the issue is not between the Parliament of Canada and the Legislative body of the Territories for which the Court is established, but between the Parliament of Canada and the Legislature of Manitoba.

The North-West Territories, like the Territories of the United States, are to be regarded as in a state of pupillage, and the Dominion has retained the supreme legislative powers given to it by the "Rupert's Land Act, 1868." The Lieutenant-Governor in Council has certainly power to make ordinances in relation to "the administration of justice, including the constitution, organization, and maintenance, of territorial courts of civil jurisdiction," but this is controlled by the proviso in the Act that no ordinance "shall be inconsistent with, alter or repeal, any provision of any Act of the Parliament of Canada" that relates, or is extended, to the territories. So that, as far as the Lieutenant-Governor in Council is concerned, the Act would appear to be perfectly constitutional.

But when we come to consider the position of Manitoba the case is not quite so clear. The question must suggest itself, after a careful perusal of the two sections quoted, can the Dominion of Canada set up the Court of Queen's Bench of Manitoba—a Provincial Court—as a Court of appeal for the North-West Territories? Can it make a Provincial Court an appellate Court for a district over which the Court has not otherwise jurisdiction?

It may, presumably, now be taken as pretty well settled law that the Parliament of Canada may declare that any Provincial Court shall be a Court for the enforcement of Dominion Laws, and may also regulate the procedure in regard to such particular laws; or the Parliament of Canada

may establish additional Courts in the Provinces for the same purpose, and provide them with suitable machinery and procedure.

Now the appellate jurisdiction which the Act purports to give to the Court of Queen's Bench must either be annexed to the Court *quoad* a Provincial Court, or else the Court must be regarded as an additional Court established under section 101 of the British North America Act for "the better administration of the Laws of Canada."

As a Provincial Court can it be disputed that the Court of Queen's Bench of Manitoba has no jurisdiction beyond the boundaries (whatever these may prove to be) of that Province? Surely, if the Court exists as an appellate Court at all, it must be as an additional Dominion Court for the better administration of the Laws of Canada.

Is the Court then properly "established"? No doubt the Judges of the Court of Queen's Bench are Dominion officers, in the sense, at least, of being appointed and paid by the Dominion; but even supposing these Judges to form the Court of Appeal for the North-West Territories, a Court requires, besides Judges, proper machinery for its working, namely, subordinate officials, procedure and practice. How are these to be supplied? The Act is singularly meagre in its provisions. It is true the Lieutenant-Governor in Council of the North-West Territories has power to determine from time to time "the mode of such appeal and all particulars relating thereto," but this, it is presumed, can only be construed as simply giving the power to regulate procedure in the Court *appealed from* (*e. g.* the security to be given by the appellant, stay of execution, etc.) and not the power to regulate the procedure in the appellate Court. The Dominion having failed to provide the machinery and procedure for the Court, it would also appear to be beyond the jurisdiction of the Manitoba Legislature. Notwithstanding the *dicta* in *Valin v. Langlois* (b), to the effect that the local Legislatures have no jurisdiction whatever to regulate procedure in matters within the exclusive juris-

(b) 3 S. C. R. 1; 1 Cart. 202 and 218.

diction of the Dominion Parliament, the articles on Provincial Jurisdiction over Civil Procedure, in volume II. of this journal (c) go to show that this position is not, at the same time, *strictly* and logically tenable, and that the local Legislatures, in framing general rules of procedure for the Provincial Courts which must be observed by suitors, have the power, at least indirectly, to regulate procedure in such matters. But this can only be held to apply to Provincial Courts, and if there is a Court of Appeal for the North-West Territories the argument is that it is not a Provincial but an additional Dominion Court.

It may be that the Judges themselves have inherent power to frame rules of procedure. Mr. Justice Wilson's opinion in the *Niagara Election Case* (d) to the effect that where the Dominion Parliament has failed to provide machinery the Courts of their own inherent power can frame rules of procedure, would seem consonant with common sense and that public convenience "that amounts almost to necessity." But even granting to them the power to frame rules of procedure, no provision is made with respect to subordinate officials, and the ordinary machinery of a Court. Surely the officials of the Court of Queen's Bench of Manitoba, appointed and paid by the Province, are Provincial officials, and the argument of the Chief Justice of British Columbia in the *Thrasher Case*, that such officials in British Columbia are officers of the Dominion under the 129th and 130th sections of the British North America Act, has here no place, as neither the Court of Queen's Bench of Manitoba nor its officials were in existence at the Union.

Quære, then, whether these officials can be made use of by the Dominion for the benefit of the inhabitants of the North-West Territories?

In *Valin v. Langlois* great stress was laid on a feature in the Act under consideration in that case which is conspicuous only by its absence from the "North-West Territories Act, 1880." Lord Selborne, in delivering the judgment of

(c) Pages 313, 361, 409, 457, 513, 561.

(d) 29 C. P. 261.

the Privy Council, said, "when their Lordships go on to look at the provisions which follow in the Act, it is clear not only that a new jurisdiction is conferred on the Courts, but that everything necessary for the exercise of that new jurisdiction is provided for (e).

Again Ritchie, C.J., said, "The Act conferring this jurisdiction provides all necessary materials for the full and complete exercise of such jurisdiction in a very special manner wholly independent of, and distinct from, and at variance with the exercise of the ordinary jurisdiction and procedure of the Courts (f).

That the difficulty suggested is a practical one, is apparent when one considers the position of a would-be appellant from the decision of a stipendiary magistrate in the North-West Territories in the absence, which it is believed is the case, of any rules of procedure in the appellate Court.

FORT MACLEOD.

C. C. McCAUL.

(e) 1 Cart. 164.

(f) 1 Cart. 182.

THE RESIDENCE OF A CORPORATION.

The days in which a corporation was said to have neither body nor soul must be numbered amongst the younger days of the world. A corporation is now held to be responsible for wrongful acts, the gist of which implies the possession and malicious use by it of faculties which are the attributes of beings possessing minds and souls.

Necessity has caused the law to advance a step further and to attribute to a corporation the capacity to dwell, reside, or have a home at some fixed place where it may be visited with the penalties of infractions of the law. Such was the dictum of Baron Martin, in *Adams v. G. W. R. Co.* (a), who said, "In my judgment the word 'dwell' in this section (b), when applied to a corporation, means something analogous to what it means when applied to an individual, viz., a dwelling at some fixed, known, place, not on the whole line of railway, but where its principal business is carried on." So Wilde, B., in the same case, said, "I agree that we must assimilate the case to that of an individual. The 'home' of a company must be taken to be that place which is occupied as such, where their profits come home to them, whence orders emanate, and where the chief officers of the company are to be found. The Great Western Railway appears to dwell at Paddington and at Paddington alone." And in *Taylor v. Crowland Gas Co.* (c) it was held that a company dwelt where it carried on its business. In these cases, while the fact is recognized that a corporation must necessarily have a home or place of residence at the place where it carries on its business, there appears to be laid down a broad general rule as to the place where we must look for the place of business or residence. A perusal of the cases will show that it must be modified to a great extent;

(a) 6 H. & N. at p. 408.

(b) 9 & 10 Vict. cap. 95, sec. 128 (Imp.)

(c) 11 Ex. 1.

we shall therefore glance at some of the decided cases, and make an endeavour to classify them.

Railway Companies.—Many of the cases decided have been those in which railway companies have been defendants. The very fact that a railway must have a roadbed and stations at various points on its line seems at first sight to be some indication that the railway company must have a local habitation. But this fact has operated to establish the home or dwelling place, not along the line, but at the place only where the directors meet. The question has arisen frequently under the County Courts Act in England (*d*). Two sections use the expression “dwell or carry on his business”; and one uses the word “dwells” alone. Both have been held as a matter of necessity applicable to corporations. Section 60 of the Act provides that a summons may issue in the County Court in any district “in which the defendant or one of the defendants shall dwell or carry on his business.” Section 128 is as follows:—“All actions which before the passing of this Act might have been brought in any of Her Majesty’s Superior Courts of record, where the plaintiff dwells more than twenty miles from the defendant, or where the cause of action did not arise wholly or in some material point within the jurisdiction of the court within which the defendant dwells or carries on his business at the time of the action brought * * may be brought in any Superior Court at the election of the party suing.” This latter section gives to the Superior Courts concurrent jurisdiction with the County Court in certain cases.

Brown v. L. & N. W. R. Co. (*e*) is sufficiently representative. In that case the company had its principal office at Euston Square, in the County of Middlesex, where its common seal was kept, and its directors and shareholders met. The company had a station at Chester, and the entire management of the line there was under a district superintendent, who was under the general management of the directors at Euston Square. The company was sued at

(*d*) 9 & 10 Vict. cap. 95.

(*e*) 4 B. & S. 326.

Chester in the County Court. Wightman, J., said, "Where do the defendants carry on their business? It is admitted by Mr. McIntyre that if the Chester station were one of the subordinate minor stations on the railway, the company could hardly be said to be carrying on their business there; but he argues that it is otherwise if you look at the magnitude of that station. If, indeed, the statute had used the words where the defendant shall 'carry on his business, or part of his business,' the argument of Mr. McIntyre would be well founded, and the present case would be within the statute. But the words are general, where he shall 'carry on his business,' i. e., his general business, and not that which is limited to some particular portion of a line of railway." To the same effect is *Adams v. G. W. R. Co.* (supra), where Martin, B., said the company did not dwell on the whole line of railway, but where its principal business is carried on.

A similar decision was arrived at in *Ahrens v. McGilligat* (f) where the Court of Common Pleas held, that a railway company did not "live and carry on business" at any other place than its head office, within the meaning of the garnishee clauses of the Division Courts Act. The decision is expressly based upon three cases, viz., *Minor v. L. & N. W. R. Co.* (g); *Brown v. L. & N. W. R. Co.* (h), and *Ex parte Charles* (i). Of these cases only one is expressly applicable to the principal case, viz., *Brown v. L. & N. W. R. Co.*, the effect of which we have already given. The other two cases turned upon an entirely different point, and belong to the class which form the subject of the next paragraph.

Carrying on business by agents.—In *Minor v. L. & N. W. R. Co.* the facts were these. Pickard & Co. carried on business as carriers' agents. They were agents for the defendants for the purpose of receiving goods to be conveyed by the company's goods trains, and notice of this appeared in the company's railway office. Pickard & Co. were also agents for several other lines of carriage, and in fact did

(f) 23 C. P. 171.

(g) 1 C. B. N. S. 325.

(h) Supra.

(i) L. R. 13 Eq. 638.

business for themselves as such agents. An action was brought against the company based upon their alleged residence at the place where Pickard & Co. carried on their business. The judgment was against the plaintiff's contention, for it was said "the only business carried on at that office (Pickard & Co.'s) was that which Pickard & Co. themselves carried on there, viz., the business of railway agency to the defendant and several other companies."

Corbett v. Gen. Steam Nav. Co. (j) is to the like effect. There it was held that a company carrying on business in London, which employs in a country town a general commission agent who transacts the company's business in such town in an office for which the company pay him rent, does not carry on business in that town within the meaning of section 128 of the County Court Act.

In further illustration of the phrase "carry on business" we may refer to several cases as to individuals.

In *Minor v. L. & N. W. R. Co.* (supra) where an analogy was drawn between a company and an individual, Cockburn, C.J., asked the question, "Could a manufacturer at Manchester be said to carry on business at the warehouse of his agent in London?" The answer is given in *Ex parte Charles* (k), and *Shiels v. Rait* (l). In the former case Charles & Co. carried on business in Sheffield. They leased three rooms in London, two of which were occupied by an agent, who kept samples there but no stock of goods. His duties were to solicit orders, and he was paid by commission and salary. Charles & Co. used to insert the office in London as one of their places of business in their invoices and bill heads. It was held that they did not carry on business in London within the meaning of the Bankruptcy Act, 1869.

In the latter case a rule was moved for to deprive the plaintiff of costs because he had sued for a debt not greater than twenty pounds in a Superior Court. He resided in Scotland, and carried on business in London by means of an agent. The rule was refused on the ground that he did not carry on business in London.

(j) 4 H. & N. 482.

(k) *Supra*.

(l) 7 C. B. 116.

Blackburn, J., however, was of opinion in *Brown v. L. & N. W. R. Co.* that an individual might be amenable to process in several places under the County Courts Act. We shall touch upon this subsequently.

Trading Companies.—A distinction has been drawn between railway companies, and trading and manufacturing companies. The railway cases are not applicable to the cases of trading companies (*m*). Chief Baron Pollock in *Keynsham v. Blue Lias Lime Co.* said that in the case of railway companies, there being a multitude of stations on the line of railway, the Courts construed the Acts the best way they could under the circumstances; and in deciding this case he said, "In my judgment that furnishes no rule whatever for the plain case of a company having a place of business where they manufacture an article and there sell and deliver it to persons residing in the neighbourhood, as this company did." Bramwell, B., cited *Taylor v. Crowland Gas Co.* (*supra*) with approval, and said, "I think that the office in London was merely a place where the directors met for their own convenience, not the place where the business of the company was carried on."

And in *Taylor v. Crowland Gas Co.* (*supra*), it was held that a company dwelt where it carried on its business, *i. e.*, at the place where it supplied gas for the manufacture and furnishing of which it was created.

As against these cases there are the elaborate cases of *Calcutta Jute Co. v. Nicholson*, and *Cesena Co. v. Nicholson* (*n*). These were cases in which the right to tax the companies was raised under 16 & 17 Vict. cap. 84, sec. 2. The words in question were, "The annual profits or gains accruing to any person residing in the United Kingdom from any kind of property whatever, whether situated in the United Kingdom or elsewhere * * and from any trade or employment, whether the same shall be carried on in the United Kingdom or elsewhere." It is evident from these words that for the purpose of the Act, a company might have a place of residence separate and distinct from the place of business. The income

(*m*) Per Channel, B., in *Keynsham v. Blue Lias Lime Co.*, 2 H. & N. 729.

(*n*) L. R. 1 Ex. D. 428.

is taxed. It is the income that is the objective point of the statute ; it is not the person, nor the manufactures, goods, or trade, that is to be subject to the tax ; and the draughtsman has been very careful to point to a source from which the income is derived, viz., the property or employment or trade, and with as great care to follow it to its destination at the residence of the recipient. At the latter place it is made subject to taxation. For the purpose of the Act, therefore, a corporation must be taxed, if at all, at the place where its profits or gains accrue, where the directors meet, where the final business of the company in the declaring, allotting and paying of dividends is transacted. Under this enactment a company must have its place of residence just where the Act in effect declares it to be, not at the place of manufacture, or trade, but at the place where the net income is finally dealt with. We might with propriety call the residence of a company under this Act its financial residence. It was upon the words of the statute that the cases turned (o) ; but there was imported into them also the test of carrying on business by agents, already referred to. Kelly, C.B., at p. 445, said, "What is the meaning of the word 'residing', as applied to a joint stock company, and to this case? The answer is—whether there may or may not be more than one place at which the same joint stock company can reside, I express no opinion at present—a Joint Stock Company resides where its place of incorporation is, where the meetings of the whole company, or those who represent it, are held, and where its governing body meets in bodily presence for the purposes of the company, and exercises the powers conferred upon it by statute and by the articles of association. That acts of the highest importance, affecting the well being of the company, the operation of its business, the realizing and disposing of its funds, are done in India, is perfectly true ; but they are all done by mere agents—whether they be directors or not—appointed under the sole authority of the governing body in this country. If a company can be said to reside anywhere—and we must suppose that it can, in order to give any effect to the

(o) Per Kelly, C.B., at p. 444, *ad. fin.*

statute as applied to Joint Stock Companies—this company undoubtedly resides at the office in St. Helen's Place, where the meetings are held." Previous cases were referred to and discussed by Baron Huddleston in giving his judgments which agreed with that of the Lord Chief Baron.

Plurality of Domiciles.—"The use of the word 'residence,'" said Huddleston, B., in *Cesena Sulphur Co. v. Nicholson*, (supra) "is founded upon the habits of a natural man, and is therefore inapplicable to the artificial and legal person whom we call a corporation. But for the purpose of giving effect to the words of the legislature, an artificial residence must be assigned to this artificial person, and one formed on the analogy of natural persons." Blackburn, J., in speaking of an individual, or natural person, as amenable to process under the County Courts Act, said, "The idea of the legislature was that the County Court of the place where the defendant dwelt or carried on his business was the convenient County Court to sue in, for he would be there to manage his cause. They were doubtless thinking of such cases as that of a shop-keeper in Westminster who has a villa in the country, when it would be equally convenient to sue him at the shop to which he goes every day, or the villa to which he returns every evening. I think there are cases in which a man may be dwelling or carrying on business in more places than one. For instance, a man dwelling as a private person in Surrey may be a partner in a bank in London, and a merchant at Liverpool; and probably a servant, who had a cause of action against him for improper dismissal, might sue him at any of these places. Generally speaking, a man carries on his entire business where the general superintendence of it is" (p). This doctrine has been applied in two cases to companies. In *Carron Iron Co. v. Maclaren* (q), Lord St. Leonards said, "The company manufactured in Scotland and England. There may be two domiciles and two jurisdictions, and in this case, there are, as I conceive, two domiciles and a double sort of jurisdiction, one in Scotland and one in England,

(p) *Brown v. L. & N. W. R. Co.*, 4 B. & S. at p. 335.

(q) 5 H. L. C. at p. 459..

and for the purpose of carrying on their business, one is just as much the domicile of the corporation as the other."

Though Lord St. Leonards differed from the majority of the Lords, his view of the law has been approved of, and it has been pointed out that he did not differ on this point. In *Newby v. Van Oppen* (r), it appeared that Colt's Patent Firearms Company was an American Company, incorporated by American law, but it had a place of business in England, and *de facto* carried on business just as an English corporation might do, though the principal place of business and the head office were in the United States of America. The contract in question was made in England by the corporation there carrying on business; the writ was served on the manager in England. Two points were raised, 1st, whether a foreign corporation could be sued as defendants in an English court; 2nd, whether the corporation had been properly served supposing them to be suable. As to the first point, the court would not prevent the plaintiff from proceeding, but left the corporation to raise the question after appearing on the record. As to the second judgment went for the plaintiff. The judgment is valuable as being that of Blackburn, J., who had previously expressed his opinion as to the possibility of a natural person having several places of residence or business for the purpose of being sued. He said, "It was argued that the American corporation was resident in America, and must be served, if at all, as a foreigner resident out of the jurisdiction, subject to the difficulties which are pointed out in *Ingate v. Austrian Lloyds Co.*, 4 C. B. N. S. 704. This would be so, if the foreign company had merely employed an agent here who made a contract for them; but we think it is different where the foreign corporation actually has a place of business and trade in this country. This is a point of very considerable practical importance. There are already several Scotch banking corporations that have established branches in London. We see from this case, that there is at least one American corporation that has set up a branch business here, and there will probably soon be more. Such

(r) L. R. 7 Q. B. 293.

a corporation does for many purposes reside both in England and in its own country. In the case of *Carron Iron Co. v. Maclaren*, 5 H. L. C. at p. 459, Lord St. Leonards, taking a different view of the facts from that taken by Lords Brougham and Cranworth, thought the Scotch corporation was resident in England. We think there is great good sense in what Lord St. Leonards states to be the law on his view of the facts. [His Lordship then quoted the passage we have already cited.] The majority of the Lords took a different view of the facts and thought that though the corporation possessed property in England, and had agents there, they did not carry on business there; but we do not find that they differed from Lord St. Leonards' view of the law if they had agreed as to his facts, and in the present case the fact is clear that the American company are carrying on trade themselves in London, and therefore, we think, must be treated as resident there."

Dicey (s) thinks the better opinion to be that a corporation has, following the analogy of an individual, one principal domicile, as the place where the centre of its affairs is to be found, and that the other places in which it may have subordinate offices correspond as far as the analogy can be carried out at all to the residences of an individual.

(s) Dom. 112.

EDITORIAL REVIEW.

Enquiries by the Committee of Discipline.

A recent inquiry by the Committee of Discipline into the conduct of a gentleman charged with unprofessional conduct, furnishes an opportunity to question the usefulness of the Benchers continuing to exercise their jurisdiction in this respect.

We have hitherto refrained from commenting upon these inquiries because the charge laid and the result of the inquiry have never before been made public. In the case to which we refer, the publication of the result was fully justified by the previous publication of the charge laid, and the whole matter (except the evidence, which was not made public) has so become a fair subject of comment.

The propriety of withholding from the public, or at least the profession, the results of these trials is questionable. If a charge is laid, rumour gives it a certain publicity, and fiction and comment are so mingled with the actual facts of the case that the true circumstances are seldom known. The inquiry goes on with closed doors, and the result, whether acquittal or censure, is kept as secret as the charge. If an unfounded charge has been made, the person charged has the indisputable right in all cases to have the result of the inquiry published. If the charge is found to be true, the profession and public have just as indisputable a right to know who is the person charged, what he is charged with, and what punishment, if any, has been imposed upon him.

These remarks are subject always to the question of the propriety and justice of such inquiries. Every decision of the Committee of Discipline or Convocation should be rendered with that most important qualification—so far as we know, or so far as we can ascertain the facts. For the Committee is powerless to compel the attendance of

witnesses, and proceeds entirely and solely upon the voluntary statements, not made upon oath, of such persons as may choose to appear before it at their own expense. The impotence of the committee, their inability to ascertain all the facts by enforcing the attendance of the witnesses and compelling them to answer, must work the greatest injustice in a case where a well founded charge is laid, for the complainant in most cases (where the evidence is not documentary) will not only be unable to substantiate his charge, but his failure to do so leaves him open to the unpleasant imputation of having maliciously accused his professional brother of an offence of which he appears to be innocent. The inefficient working of the Committee in this respect was exemplified in the recent inquiry in a very marked manner. The one person who could have completely proved or disproved the charge laid was present at Osgoode Hall during the inquiry, but absolutely refused to make any statement. By doing this he laid himself open to the imputation, on the one hand, of having refused to come forward and clear up a very disagreeable charge laid against a member of his own profession, or, on the other hand, of having withheld such important testimony as would have shown the charge to have been well founded. His presence and refusal to testify were not concealed, and we can therefore add to the verdict of the committee that the charge was utterly groundless, the very important qualification that we have before referred to, viz., so far as the committee can ascertain. The decision, however, we have no desire to quarrel with. It is matter of congratulation that a charge should be dismissed rather than proved; and every complainant who invites an enquiry by the committee must know that he is choosing a tribunal powerless to do either himself or the accused complete justice; and if he chooses his tribunal he must accept its decision.

We have now to point out the danger and injustice attendant upon the retention and exercise of this power by the Benchers. It puts it in the power of any member of the profession, or for that matter, any of the public, to make a

malicious and totally unfounded charge against an innocent member of the profession. The matter may be noised abroad, and in the meantime the accused is treated to an inquiry with closed doors which may result in the failure on the part of the complainant to produce any evidence whatever in support of the charge. As there is no provision for indemnity as to costs any one may bring charges without fear of being visited with the expense of the inquiry.

A person who is really guilty of the offence charged may, by a judicious silence on his own part, and by well directed efforts to prevent the attendance of witnesses, or by the destruction of documentary evidence, completely disarm the complainant and leave the Committee to find the charge not proven.

The mode of obtaining and giving testimony is objectionable. If an inquiry is to be made it should be public. An innocent man desires to have the charge openly made and the whole truth known so far as it can be made known. If publicity were given to the enquiries, people would be less apt to make them. The fact that statements are not made upon oath is also a serious objection to these enquiries. As long as testimony is given upon oath in courts of law nothing less will be satisfactory upon enquiries of this kind. With the very best intentions in the world to tell the naked truth, the best of men, when not upon oath, will so mingle matter of argument with statements of fact that it is impossible to separate them.

If a charge is to be made against a barrister or solicitor, let it be made upon oath, before a Court of Justice in the face of the public, let the attendance of all witnesses be compelled and let all documentary evidence be produced, let the evidence, argument and decision, be as publicly given and made as the charge, and let the party who is in default bear the expense as in other cases. The observance of these principles will prevent unfounded charges being made, half proved facts being made the foundation of apparently fully proved and well considered decisions, and will result in the public punishment of guilty persons and the open acquittal of the innocent.

The Commission on the Bribery Case.

The Bribery Commission, as the learned chairman facetiously calls it in his public notices, has been opened. What is going to be done is not quite clear as yet, but it may be safe to predict that in the face of *Landers v. Woodworth*, 2 S. C. R. 158, and the volume of authority cited therein, the validity of the proposed proceedings will not pass unchallenged. How the enquiry can be justified, pending the trial of those who are already in the hands of justice, will no doubt be cleared up in due time, and the decency of calling witnesses and extracting their testimony before the accused are tried on the merits by a jury, will also, no doubt, be sufficiently explained at the proper time. In the meantime we can only wait and bestow upon the proceedings the usual amount of sleepy interest that one has for the events that happen in the long vacation.

Since writing the above the *Albany Law Journal* of the 28th June has come to hand containing a report in full of a case of *the People ex rel. McDonald v. Keeler*, which was a proceeding by *habeas corpus* to bring up the body of one McDonald who had been imprisoned by the Senate of the State of New York for alleged contempt in refusing to answer questions put to him by a committee of the Senate, and retiring from the presence of the committee when not permitted to have the advice of counsel.

Mr. Justice Westbrook had refused the order for McDonald's discharge, following the decisions of the State of New York (which we believe, however, are contrary to those of the Supreme Court of the U. S. A.) but against his own views. On appeal to the General Term this decision was reversed and McDonald was discharged. The Court held

1. That the questions put to McDonald by the committee were immaterial and that he was not bound to answer them.
2. That McDonald had the right to have the advice of counsel, in an orderly manner, and that when this was refused, he was justified in withdrawing.
3. That except when engaged in the judicial functions authorized by the

constitution neither branch of the Legislature has any power to punish as for contempt for a refusal to answer a question. 4. That the order refusing to discharge McDonald should be reversed and that he should be discharged.

Professional Morality.

We referred before, (ante. p. 110) to a practice which evidently obtains to some extent in Manitoba, viz., that of Manitoba attorneys doing business for Ontario solicitors and sharing the fees with them. A statute of Manitoba provides a remedy. It appears that the Benchers of the Law Society of Manitoba have taken up the matter, and are determined to put a stop to it. They have issued the following circular to the profession in Manitoba :

"SIR : The attention of the Benchers of the Law Society of Manitoba has been drawn to the fact that several members of the profession here are transacting business for Ontario attorneys on agency terms, and as such an arrangement is clearly in contravention of the statute, they desire to call the attention of the members of the profession to that fact, and to intimate that if hereafter any such members are found so acting, in face of the statute, the Benchers will have no alternative but to put in force the penalties prescribed by the statute."

Dominion Silk.

The following gentlemen have been appointed Queen's Counsel by His Excellency the Governor-General : Messrs. F. McKenzie, Sedley Blanchard, J. B. McArthur, and A. C. Killam, all of Winnipeg.

We have noticed in Winnipeg newspapers that a certain gentleman, hitherto, we believe, the only Queen's Counsel in Manitoba, has been in the habit of placing after his name the letters, Q.C.D. The D., we presume, is the initial letter of Dominion, but its use in this connection is unique. We hope the deserving gentlemen lately appointed will not adopt this method of distinguishing themselves,

unless the Lieutenant-Governor undertakes to assert Provincial Rights by creating all the other gentlemen at the Bar Provincial Queen's Counsel.

The American Law Journal.

This is a new weekly publication which has lately come to hand. It promises well, the contributed articles are prepared with care, and in addition to these it contains a variety of solid reading matter. A long list of well known text and leader writers who promise contributions bids fair to make it one of the leading journals in the United States.

BOOK REVIEWS.

A Manual, containing a short summary of the usual practice and manner of proceeding in ordinary cases coming under the observation of Justices of the Peace, Coroners, Constables, Landlords, Bailiffs, etc., and also containing a large amount of useful information for farmers, mechanics, business men, and the public generally. By EDWARD NORMAN LEWIS, of Osgoode Hall, Barrister-at-Law. Carswell & Co., 1884.

We do not know whether coroners and constables, farmers and mechanics need such a book as this, but we do think that Justices of the Peace require one; and we hope that all of them who can read will read it. It appears to be the rule, rather than the exception, for convictions by Justices to be quashed. We confess to almost as little knowledge of criminal law as the average Justice himself possesses, but the text of this manual seems to be reasonable, at any rate. No authorities, except statutes, are cited and we cannot therefore verify the law laid down. The forms will prove an inestimable boon to all those for whom they are intended.

REVIEW OF EXCHANGES.

Albany Law Journal.—12th January, 1884.

Common Words and Phrases, continued in the following number; Adjacent; Family; Good hunter; Seaman; Voluntarily; Health; Place of public entertainment; Incestuous connexion; Other business; Income; Contractor; Fence; Construction and erection; Last sickness; are defined.

Ibid.—26th January, 1884.

Upstairs and Downstairs Tenants, by R. VASHON ROGERS. A collection of cases upon the mutual rights of inhabitants of the same building.

Ibid.—2nd February, 1884.

Common Words and Phrases, Privilege; Personal indignity; Printed; Tracing; Furniture; Coil; Account; Adjoining; Day; Peace; are defined.

The Presumptive Validity of Official Acts, by JOHN D. LAWSON. Rule 1. The presumption is that one who is proved to have acted in an official capacity possessed the necessary and proper authority. 2. The presumption is that public officers do as the law and their duty require them. 3. And the same presumption prevails as to the acts of private officers.

Ibid.—16th February, 1884.

Extension of Tax Collector's Time—Effect on Sureties. Cases are cited both for and against the proposition that a surety on a collector's bond is released by an extension of the collector's time by the Legislature.

Ibid.—23rd February, 1884.

Common Words and Phrases. Money; Horse; Wherefore; Premises; Conceal; Sound health; are defined.

Presumptions Arising from the Usual Course of Business, by JOHN D. LAWSON. Rule 1. In commercial transactions the presumption is that the usual course of business was followed by the parties thereto. 2. An agreement to pay for services rendered and accepted is presumed, unless the parties are members of the same family or near relatives. Sub-rule 2. Negotiable paper is presumed to have been regularly negotiated, and to be or to have been regularly held, except where it was procured or put in circulation through fraud or duress or is illegal.

Ibid.—15th March, 1884.

Common Words and Phrases, Continued in the following number For; Stranding; Adjoining; Standing or riding upon the platform; Out west; Bank note; Effects; Night, Afternoon; Domestic animal; Child Consent; Probability; From, In; Understanding; Culvert; Surprise; Cruel and unusual punishment; School; Office or place of trust or profit; State; Creditor; Manufactory; Factory; Owner; Person or property; Bridge; Traveller; Domestic animals; are defined.

Presumptions Arising from the Course of Business, by JOHN D. LAWSON. Rule 1. The presumption is that any act done was done of right and not of wrong. 2. The performance of a mere moral duty is not presumed. 3. Documents regular on their face are presumed to have been properly executed, and to have undergone all formalities essential to their validity. 4. Dates are presumed to be correct when found in written instruments, but are no evidence of collateral facts.

Ibid.—29th March, 1884.

Constructive Notice, Concluded in the following number. Actual notice is a question of fact; constructive notice is a legal inference from established facts. The subject is treated under the following heads:—Knowledge of facts to put on inquiry; actual notice to agent; notice to sub-agent; Lis pendens; Possession; Recitals; Records.

Ibid.—12th April, 1884.

Common Words and Phrases. Show, Indicate; Alley-way; Passenger ship; Live stock; Running at large; Abide; Appendage; Present time; Carriage; Business; Religious worship; are defined.

Presumption of Negligence, by GUY C. H. CORLISS. A collection of English and American cases, showing where mere proof of a casualty, whereby the plaintiff was injured has been held sufficient to throw upon the defendant the onus of proving that he has been free from fault.

Ibid.—19th April, 1884.

Common Words and Phrases, Manual labour; Harvest; Actually dwells; Beach; Upon; Rape; are defined.

Ibid.—3rd May, 1884.

The Abolition of Oaths, by LOUIS CLAUDE WHITON. The learned writer opens with a history of oaths. He next considers the inutility of oaths, and illustrates it by examples. He proceeds to show that the administration of oaths is a positive evil; and proposes finally to increase the punishment for false testimony "to that of a crime of the first magnitude." "Let false testimony, and not the infraction of an oath, be the crime. In this way the ends of justice and Christianity will be better preserved."

The Presumption of Life, by JOHN D. LAWSON. Rule 1. Love of life is presumed, and a person proved to have been alive at a former time is presumed to be alive at the present time until his death is proved or a presumption of death arises. 2. Death may be proved by reputation, by hearsay or by evidence of facts inconsistent with the theory of the existence of life. 3. One who is proved to have been unmarried when last known to be alive will be presumed to have died childless; but it is otherwise where he or she was married when last known to be alive. 4. But it is to be presumed that a person proved to be dead left an heir.

Law Journal.—15th September, 1883.

Construction of a Statute by Reference to the Proceedings in Parliament. In *Regina v. Bishop of Oxford*, 48 L. J. Q. B. 609; L. R. 4, Q. B. D. 425, this point came up, and the speech of the Lord Chancellor in moving the third reading of the Public Worship Regulation Act, 1874, was held by the Court of Appeal to have been properly referred to as an authority—"This case is an authority that, if resort can be had to legislative proceedings at all, four requisites are necessary for praying in aid proceedings in Parliament for the construction of a statute; first, it must be a passage from a speech, not a reference to charges made in the Bill itself; secondly, the speech must be directed to explain a projected change in the law, showing what the existing law is, and what changes are intended to be effected in it; thirdly, it is only admissible for the purpose of showing what the pre-existing law was, not for the purpose of interpreting the Act of which it was altered; and fourthly, it must be made by a judge or some person whose authority would be citable if expressed in a text-book. It follows that such a speech could not be made in the House of Commons, and if made at all, could only be in the House of Lords." After citing *S. E. R. Co. v. Railway Commissioners*, 50 L. J. Q. B. D. 201, however, the learned writer concludes that "legal opinions expressed while a Bill is passing through Parliament, by an authority however eminent, cannot be cited at all."

Ibid.—22nd September, 1883.

The Nature of Disciplinary Orders on Solicitors. In *Re Freston*, reported in the September number of the L. J. Rep., an order was made on a solicitor to deliver up papers, repay a sum of money, and pay the costs of the order. He had complied with the order except as to paying the costs. On returning from defending prisoners on a preliminary enquiry he was arrested for contempt in not paying the costs. It was held that the privilege from arrest existed in the case, but that the process was quasi-criminal and the arrest was valid.

Ibid.—29th September, 1883.

Can there be Anglo-Chinese Domicile? An Englishman went to Shanghai and there died. It was held that he had not acquired any foreign domicile. By reason of the treaties with China Englishmen may reside there, but all questions of property and person are subject to British jurisdiction. Locally, therefore, a resident is in China, but by the fiction of the treaties he is not in China but in England.

What Debts can be Attached? A debtor was entitled to an annual sum payable by trustees under a will, in February and August, out of the income of a trust fund. In November a garnishee order nisi was made, but, on an issue tried, it was held that there was no debt owing or accruing in respect of the next half year's payment. The learned writer points out that an annuity is a piece of property, not a debt.

Ibid.—13th October, 1883.

The Payment of Premiums by Volunteers. Referring to *Leslie v. French*, reported in the L. J. Rep. for October, the learned writer says, "The moral of the decision is that volunteers paying premiums on a policy must not rely on the mere fact that they have paid them as giving them a title to a lien or even to repayment. The payment must be on the request of the owner, and if the policy is itself held it would be as well that an express agreement giving a lien should be arrived at."

Ibid.—27th October, 1883.

The Mythical "Legal Fraud." In *Jolliffe v. Baker*, reported in the October number of the L. J. Rep., Mr. Justice Williams repudiates the existence of such a thing as "legal fraud," i.e. something which is fraud in a court of justice but not so outside.

Ibid.—17th November, 1883.

The Duty of Care towards One's Neighbour.—*Heaven v. Pender*, L. J. Rep., for November, is discussed. The plaintiff had contracted with the owner of a ship to paint her, and he was injured by the fall of staging through the negligence of the defendant, who had supplied a defective rope. He obtained judgment.

Ibid.—8th December, 1883.

Corporations and Unsealed Contracts. A recent case of *Younger v. Mayor of Leamington*, December number of L. J. Rep., is discussed. Lord Bramwell takes the view that shareholders and ratepayers have the right to protection, by requiring formality and solemnity in the making of their contracts.

Ibid.—15th December, 1883.

The Rights of Employer and Employed in Photographs. *Nottage v. Jackson*, December number of L. J. Rep., decided that the proprietors of a photographic studio are not the authors of photographs taken by their employees.

Ibid.—22nd December, 1883.

The Privilege of an Advocate's Words. *Nunshe v. Lamb*, L. J. Rep. for December, is discussed, chiefly with reference to the difficulty the learned reporter for the Law Reports had in making a headnote thereto.

Ibid.—29th December, 1883.

Criminal Information against Newspapers. The technical questions raised in *Regina v. Yates*, L. J. Rep. for December, are discussed. The question, what is the commencement of a prosecution? is raised.

The Doctrine of Part-performance in the Lords. A case of *Maddison v. Alderson*, L. J. Rep. for December is discussed.

Ibid.—12th January, 1884.

The Lodgers' Goods Protection Act. A criticism of this legislation, which inferentially requires a lodger to make a declaration as to his property and indebtedness to his landlord every time the tenant owes rent to his superior landlord, which may be once a week.

Ibid.—19th January, 1884.

Two Cases of Easement. *Hollins v. Verney* and *Tone v. Preston*, L. J. Rep. for January, are discussed. The first case is said broadly to lay down that an easement which is only exercised at intervals of a year cannot be acquired under the Prescription Act. The other appears to lay down that a proprietor cannot gain an easement against his neighbour by a use of his land inconsistent with something which he has covenanted with some one else to do.

What is an Innkeeper's Quest? *Strauss v. County Hotel Co.*, L. J. Rep. for January, is discussed. The plaintiff had handed his bag to the hotel porter at the railway station, and the latter got his baggage from the train. The plaintiff having received a telegram changed his mind and concluded not to stay at that place, but called for and took luncheon. When he called for his luggage it could not be found. Held that he was not a guest and could not recover for the loss.

The Marriage of Wards of Court. "Upon or in contemplation of marriage" used with reference to a settlement includes a settlement made after marriage in case of an infant ward. In the case under discussion, *Re Sampson and Ward*, the husband being in gaol for contempt in marrying the ward, agreed to execute a settlement which had been prepared. The wife refused to execute because it prevented her from making an appointment in his favour in the event of her dying without issue. The court proposed to make the husband covenant for the wife's execution. The absurdity of this is pointed out, for it tends to perpetuate the influence of the husband which was always the danger to be apprehended. Lord Justice Cotton pointed out that the rule was that the offending party would not be allowed to take any interest in the property which he acquired at law by reason of the marriage, but it was a very different question whether the wife should be deprived of all powers of giving her husband an interest in her property.

THE CANADIAN LAW TIMES.

OCCASIONAL NOTES.

Supreme Court of Canada.

ONTARIO.]

PAGE v. AUSTIN.

Company—Scire facias—Liability of shareholder—Illegally issued stock—Estoppel.

The Ontario Wood Pavement Company, incorporated under 27 and 28 Vict., cap. 23, with power to increase by by-laws the capital stock of the company, "after the whole capital stock of the company shall have been allotted and paid in, but not sooner," assumed to pass a by-law increasing the capital stock from \$130,000 to \$250,000. P. and others, execution creditors of the company, whose writ had been returned unsatisfied, instituted proceedings by way of *scire facias* against A. as holder of shares not fully paid up. It appeared from an examination of the books that the company assumed to increase the capital, notwithstanding that the original capital had not been fully paid in, and that the shares alleged to be held by A. were shares of the increased capital and not of that originally authorised.

Held, affirming the judgment of the Court below, 7 App. R. 1. Gwynne, J., dissenting, that as the directors had no power at that time to increase the capital of the company, the stock for which A. or his assignor subscribed had no legal existence, and therefore P. and others were not entitled to recover.

When a statutory liability is attempted to be imposed on a party which can only attach to an actual legal shareholder in a company, he is not

estopped, by the mere fact of having received transfers of certificates of stock he supposed to be in existence, from questioning the legality of the issue of such stock.

James Bethune, Q.C., for the appellants.

C. Robinson, Q.C., and *MacLennan, Q.C.*, for the respondents.

ST. JOHN v. RYKERT.

Account—Payment under pressure—Statute of Limitations—Interest on judgment debt—Interest on covenant in mortgage—Evidence.

By a decree of the Court of Chancery it was directed that an account should be taken of all dealings between the plaintiff and the defendant, and the master found that \$453.20 was due to the defendant by the plaintiff. The master disallowed to the plaintiff the amount of a note of \$510, and interest thereon; and reduced the interest on a sum of \$3,000 advanced, from twenty-four per cent. to six per cent. after judgment had been recovered. The note of \$510 was dated 18th November, 1861, and was payable with interest at the rate of \$10 per week from the 23rd November, 1861. On the 6th March, 1867, the defendant, who had been sued by the plaintiff for certain other claims, entered into agreement with him in order to relieve him from the pressure of execution debts, paid him \$2,000 on account of his indebtedness, and got time for the balance. The plaintiff made no demand at the time for this note, and did not instruct his attorney who acted for him to seek payment of it until 1870.

Held, that the payment of \$2,000 was a payment on account of the debts for which the defendant was being pressed, and as this note of \$510 was not included in the debts, the Master was right in treating the note of \$510 as barred by the statute of limitations.

Another note dated 11th January, 1862, payable to and endorsed by one S. H. was for \$3,000 with interest at the rate of two per cent. per month until paid. By a covenant for payment contained in a mortgage deed of the same date given by the defendant to the plaintiff as a collateral security for the payment of this note, the defendant covenanted to pay "the said sum of \$3,000 on the 11th day of July, 1862, with interest thereon at the rate of twenty-four per cent. per annum until paid." A judgment was recovered upon the note, but not upon the covenant. The Master allowed for interest in respect of this debt six per cent. only from the date of the recovery of the judgment.

Held, that the proper construction of the terms of both the note and covenant as to payment of interest was that interest at the rate of twenty-four per cent. should be paid up to the 11th July, 1862, and not that interest should be paid at that rate after such day if the principal should then remain unpaid.

McCarthy, Q.C., for the appellant.

James Bethune, Q.C., for the respondent.

MANITOBA.]

MAY v. McARTHUR.

Contract of sale—Fraud—Rescission—Joint liability of parties who received consideration.

M. filed a bill to set aside the sale of a parcel of land in the parish of St. John, described in the deed to M. as being block No. 35, containing 52 lots, according to plan registered, alleging conspiracy and false and fraudulent misrepresentations. The sale to M. was effected under the following circumstances:—McL. & McA. were interested in a contract with the Bishop of Rupert's Land for the purchase of three blocks of land, containing 52 lots each, and McL., with McA.'s consent and sanction, came to Toronto to sell the land. In Toronto one G. met McL. and agreed with him to find purchasers, G. to get any money over \$100 per lot. G. thereupon solicited M. to purchase the land, stating that he had secured the lots for a very short time at \$150 per lot, but that right was contingent upon his taking all the lots contained in the three blocks offered for sale, and he represented that one block of the land in question was facing McPhillips street. M. said he would purchase provided G. and one D. and himself were co-partners or joint investors in the three blocks. An agreement was signed to that effect, but it was ultimately agreed that M. should pay for and take the conveyance to himself of block 33 at \$150 per lot. G. then filled up a conveyance, which had been signed in blank by McL., of lot 35 from McA. to M., and induced him to accept it without further inquiry by producing and delivering a guarantee from McL. that he had a power of attorney from McA., and that the plan was registered and the title perfect. M. paid \$5,200 cash and gave a mortgage for \$2,500. G. got \$2,500 of this purchase money. M. subsequently ascertained that the block of land in question did not front on McPhillips street, and that G. and D. were not joint investors with him, and that statements in the guarantee were false. By his bill, M. prayed that the sale might be set aside, that the portion of the purchase money already paid might be repaid to him, and that the mortgage given to secure payment of the remainder might be cancelled.

Held, that the false and fraudulent representation made by G. and McL. entitled M. to the relief prayed for against McA., McL. and G. jointly and severally.

Robinson, Q.C., and *Kerr*, for the appellant.

Lash, Q.C., and *Moss, Q.C.*, for the respondents.

HOOD v. McINTYRE.

Property—Offer to sell—Acceptance on completion of title—Specific performance—Property sold subject to lease—Notice to vendee—Effect of.

On the 26th January, 1882, McL. wrote to H. as follows:—"Alex. McIntyre agrees to take \$35,000 for property known as McMicken block. Terms one-third cash, balance in one year at eight per cent. per annum.

Open until Saturday, 28th, noon." On the same day H. accepted this offer in the following terms:—"I beg to accept your offer made this morning. I will accept the property known as McMicken block, being the property on Main street, for \$35,000, payable one-third cash on completion of title, and balance in one year at eight per cent. You will please have papers and abstract submitted by your solicitor to N. F. Hagel, Esq., 22 Donaldson's Block, as soon as possible, that I may get conveyance and give mortgage." The property was then under lease, of which H. had no notice. On a bill for specific performance, the Court of Queen's Bench, decreed that H. was entitled to have the agreement specifically performed.

Held, Ritchie, C.J., and Fournier J., dissenting, reversing the judgment of the Court below, that there was no binding, unconditional acceptance of the offer of sale, and therefore no completed contract of sale between the parties.

Lash, Q.C., for the appellant.

McIntyre, for the respondent.

ONTARIO.

High Court of Justice.

QUEEN'S BENCH DIVISION.

[CAMERON, J., 7TH MAY, 1884.]

SHOFFER v. DUMBLE.

Replevin—Detention—Conversion—Evidence—Married woman—Gift by husband—Separate estate.

The plaintiff was executor of H. D. widow of T. D. whose executor the defendant was. The plaintiff claimed a piano in the house lately occupied by the widow, of which the defendant had the key. At an interview between the plaintiff and defendant the latter claimed the piano but said he was willing to leave the question of the ownership to a person to be named. The plaintiff left him promising to write and afterwards did write saying he had decided to bring the matter before the proper Court. Subsequently the plaintiff's solicitor wrote the defendant offering to release all demands upon the defendant giving up all claim to the piano, to which the defen-

dant's solicitor answered that he could not comply with the demand. The defendant commenced an action in which the title to the piano would come in question. The plaintiff's solicitor having again written to ask whether possession of the piano would be given, the defendant's solicitor wrote that it was perfectly safe where it was and that the action commenced would decide the question. He also wrote that the plaintiff would not have to put the law in motion.

Held, in an action of replevin (assuming the piano to be the plaintiff's) that there was no evidence of trespass or conversion to support the affirmative of the issue that the defendant did not take or detain the piano.

The evidence showed that the husband had purchased the piano and had made a present of it to his wife by putting it in the house where they lived and subsequently recognizing her right to it.

Held, insufficient to constitute the piano part of the wife's separate estate.

Riddell, for the plaintiff.

J. W. Kerr, for the defendant.

[OSLER, J. A., 20TH MAY, 1884.]

WALKER v. MURRAY.

Will, construction of—Devise to Sisters of Charity—Statutes of mortmain—Pedigree—Evidence—Declaration of deceased ancestor.

A testator devised land to K. in trust to sell and pay the proceeds to the Sisters of Charity of Hamilton to be their property absolutely. There were also bequests to K. of money to pay the same to the St. Mary's Hospital, an Orphan Asylum and a Convent. No evidence was given to show who the Sisters of Charity were. In an action to recover the land brought by the heirs at law of the testator,

Held, that a corporate capacity could not be imputed to the Sisters of Charity in order to destroy the gift to them, under the statutes of mortmain and that the devise, in any event, might be supported as a gift to the individuals who, at the time of the testator's death, filled the character of Sisters of Charity.

Declarations made by the deceased mother of the plaintiff in the hearing of the plaintiff and of her son as to the marriage of the plaintiff's parents received in evidence to prove the plaintiff's pedigree.

[ROSE, J., 13TH JUNE, 1884.]

REGINA v. CARTER.

Criminal law—Misdemeanors—Jurisdiction of justice.

Justices of the Peace out of session have no jurisdiction to try misdemeanors in a summary way, except upon special statutory authority.

H. F. Scott, Q. C., for the motion.

Murphy, contra.

[13TH JUNE, 1884.]

In re LAPLANTE v. PETERBOROUGH.

Municipal by-law—Closing street—Providing access to lands adjacent—Month's notice—Time, computation of.

A by-law was passed by the defendant municipality to close up a portion of a street by which alone the applicant had access to a piece of land sold and conveyed to him by the municipality at a tax sale without providing other convenient access to the land. The land was unpatented, but the applicant had paid all dues to the Crown Land Department. The by-law was objected to on the ground that it did not provide other convenient access to the land; that a month's notice of the passing of the by-law was not given, the notice having been given on the 28th March for the 28th April; that it provided for arbitration by the mayor and one person each appointed by the railway company and the applicant, a mode different from that provided by statute; that the award was to be made within one month from the date of passing the by-law instead of one month from the appointment of the third arbitrator.

Held, that all the objections were well taken, and that the by-law was invalid.

Held, also, that the applicant had sufficient interest in the land in question to entitle him to apply; and, at any rate, the municipality were estopped by their conveyance from setting that up.

Held, also, that a by-law amending the by-law in question would not cure it.

Aylesworth, for the motion.

Watson, contra.

[26TH MAY, 1884.]

REGINA v. COUTTS.

Conviction—Hawkers and Pedlars—Taking orders for goods—Subsequent delivery.

The defendant, who was a traveller for a tea-dealer, carried samples with him from house to house, and took orders for tea, which orders he forwarded to his employer, who sent the tea to him. The defendant then

got the tea, which had been forwarded in packages, and delivered it to his customers, receiving the price on delivery. On this evidence he was convicted of selling tea as a pedlar without a license, contrary to a by-law which prohibited hawkers, petty chapmen, and other persons carrying on petty trades from selling goods in the manner pointed out by the Consolidated Municipal Act, 1883, sec. 495 (3).

Held, that the defendant was not a hawker, within the meaning of the Act, and as the word "pedlar" was not used therein, the conviction of the defendant as a "pedlar" could not be supported under the words "bearing," etc.

Semle, that a municipality cannot pass a by-law prohibiting unlicensed traders from sending out agents to take orders from private persons for goods and subsequently delivering the goods.

Delamere, for the motion.

H. J. Scott, Q.C., contra.

COMMON PLEAS DIVISION.

[THE DIVISIONAL COURT.]

REGINA v. COUNTY OF PERTH.

Ways—Road between two townships—Purchase by county—Unsealed and unsigned by-law—Power to divest—Liability to repair.

The road in question herein ran between two townships in the defendants' county, and was originally constructed by a joint stock company. In 1866, the defendants purchased the road at a sheriff's sale under an execution against the company, and took a deed from the sheriff. A by-law was passed authorizing the purchase, but through inadvertence it was not signed or sealed, but the purchase was recognized in subsequent by-laws; and the defendants took possession and exercised exclusive jurisdiction over the road, and dealt with it as their own property until the 8th June, 1881, when they passed a by-law divesting themselves of the road.

Held, that the county had no original jurisdiction over the road under the Municipal Act; and though they might acquire the road by purchase from the company under a by-law legally passed for such purpose, and assuming that the defendants by their conduct were estopped from denying the validity of the by-law passed authorizing the purchase, or that the seal and signature could now be directed to be affixed, both of which assumptions were open to doubt, still the defendants had, as they had the right to do, divested themselves of the road, and were, therefore, not liable thereafter to keep the road in repair.

Idington, Q.C., for the Crown.

R. Smith, Q.C., for the defendants.

[ROSE, J.]

NORTH v. FISHER.

Foreign judgment—Action on—Limitation of claim.

To an action on a foreign judgment recovered in the Supreme Court of New York, the defendant set up as a defence that the cause of action accrued more than six years before the commencement thereof.

Held, on demurrer, that, under our law, the foreign judgment is only deemed to constitute a simple contract debt, and the period of limitation being governed by the law of the country where the action is brought, and not by the *lex loci contractus*, the period of limitation as set up constituted a good defence.

Carscallen, for the plaintiff.

F. Fitzgerald, for the defendant.

[ROSE, J.]

In re CROOME & BRANTFORD.

Municipal by-law—Taverns and shops—By-law fixing number of licenses—Whether should state number of inhabitants—Statement that by-law to remain in force until repealed—Duty in excess of \$200—Ultra vires.

It is not necessary that a by-law passed by a city respecting tavern and shop licenses should state the number of inhabitants of the city so as to shew on its face that the number of licenses fixed is within the statutory limit.

Held, also, that a provision in the by-law for limiting the number of licenses "for the ensuing license year beginning on the 1st day of May, 1884, or for any further license until this by-law is altered or repealed," was valid.

Held, also, that a provision in the by-law that it should remain in force until altered or repealed was unobjectionable.

An objection that the by-law was invalid, because, in addition to the other matters therein, it provided for a duty in excess of \$200, which required the assent of the electors and therefore should have been by separate by-law, was overruled, because the by-law as a fact contained no such provision; but

Quere, whether the fact of a by-law containing provisions some of which require the assent of the electors would necessarily invalidate the by-law.

Held, also, that, when a by-law states no particular power as its basis, it must be judicially regarded as emanating from that power which could authorize its passage; and, therefore, the by-law here being silent on this point must be deemed to have been passed by proper authority.

It was also objected that section 34 of the License Act of 1884 in effect repealed the by-law, as it made the duty more than \$200, and the council had not submitted the question to the electors.

Held, that, if repealed, it could not be quashed; but,

Semble, that the effect of the section was to add the increased duty to the amount already provided for by the by-laws previously passed, unless the council saw fit, prior to 15th April, 1884, to amend the by-law as to the license duty payable thereunder.

Mackenzie, Q.C., for the motion.

Hardy, Q.C., contra.

HEWISON v. TOWNSHIP OF PEMBROKE.

Municipal corporations—Closing road—Road running through several municipalities—Power to close—Rule nisi.

An application to quash a by-law must be by rule nisi and not by notice of motion.

A road, originally a trespass road, running from Ottawa to Prescott through more than one county, following the course of the Ottawa River, had been used for upwards of forty years, and had become a public highway. The road in its course intersected diagonally lots 1 and 2, owned respectively by the applicant and D. In October, 1883, D., who was then and had been for three previous years a member of the Township Council, petitioned the council to pass a by-law closing up this portion of the road, and procured E. and M., two of the council, to pledge themselves to support the by-law, which they did in the belief that it was for the public benefit; but, on their discovering the contrary and asking D. to release them, he refused to do so. He, however, pretended that he was not anxious for the by-law to pass, and petitioned the council representing that his land might be injuriously affected thereby, and asking to be heard by counsel; but as he wished, as he said, "to be let down easy," he arranged that E. should support the by-law, which, he said, would be defeated. E. accordingly voted for it, as also did M. and another councillor, D. being absent and the Reeve not voting; and in consequence the by-law carried. It appeared that D.'s counsel, who was also counsel for the township, appeared at the council meeting and spoke in favour of the by-law, and represented that D. had guaranteed the council against all expenses in the matter. It appeared also that the applicant had some buildings on his lot, adjoining the road, which were used by farmers, and which would be cut off by the closing of the road.

Held, that under the circumstances the by-law must be quashed with costs.

Quare, whether there is any power to close a road of this kind running through more than one municipality.

MacLennan, Q.C., and *Metcalfe*, for the applicant.

Deacon and Aylesworth, contra.

REGINA v. MACKENZIE.

Indian Act—Conviction for selling liquor—Imprisonment in default of payment of fine—Sale under medical sanction—Amendment.

A conviction under the Indian Act for giving intoxicating liquor to an Indian imposed a fine and costs and, in default of immediate payment, imprisonment.

Held, that the conviction must be quashed, for that while section 9 imposes, as punishment for the offence, fine or imprisonment, or imprisonment or fine, it does not authorize a fine and, in default of payment, imprisonment.

Held, that the conviction was invalid because it did not negative that the liquor was not made use of under the sanction of a medical man, or under the sanction of a minister of religion.

Held, also, that a conviction cannot be amended after the writ of *certiorari*.

Mackenzie, Q.C., for the motion.

Holman, contra.

BEGG v. THE TOWNSHIP OF SOUTHWOLD.

Drain—By-law to clean and repair—Work done including deepening—Municipal Act, 1873, secs. 570, 589—Alteration of assessment—Evidence.

A by-law passed for raising the unpaid portion of the expense of cleaning out and repairing a drain, otherwise good on its face, was objected to on the ground that while the resolution and by-law authorizing the work to be done were for such cleaning and repairing only, the work actually done included deepening.

Held, that the objection being without merits, and the by-law good on its face, and as the work had been done and paid for, and it appeared in evidence that the municipality had authorized only the cleaning and repairing, and that if in fact the drain was deepened, which was not free from doubt, it was done accidentally and not by design; and as much inconvenience would ensue if the by-law was quashed, the application was refused; but, apart from this, *quære*, whether, under sections 570 and 589 of the Municipal Act, 1883, and 45 Vict. cap. 26, sec. 17 (O), the municipality had not power with petition to do such work, including deepening, as might be incidental to maintaining the drain in an efficient state.

A further objection that the assessment was altered without notice, and without affording an opportunity to appeal was disallowed, the evidence failing to establish any such alteration.

F. Lefroy, for the motion.

Cattanach, contra.

BRODER v. THE NORTHERN RAILWAY CO.

Railways—Carriage beyond defendants' line—Loss by fire—Carriers—Warehousemen—Negligence—Proximate cause of damage.

Four car loads of flour were delivered to the defendants at Newmarket, Ont., to be carried to Chatham, N. B., under a special contract which provided that the defendants were not to be liable for any delay occasioned by want of opportunity to forward goods addressed to consignees beyond the places where the defendants had stations; that the goods were to be forwarded to their destination by public carriers, or otherwise, as opportunity might offer; that the goods, pending communication with the consignees, remained on the defendants' premises at the owner's risk; that the delivery of the goods by the defendants would be considered complete and their responsibility to have ceased when they had notified the carriers to whom they were entitled to deliver them that they were prepared to deliver the goods for further conveyance, and that they were not to be responsible for any loss, damage, etc., after such notice. It also provided that the defendants were not to be liable for damage occasioned by fire. It appeared that the defendants' line did not extend beyond Toronto, and that the goods were to be forwarded to their destination by the G. T. R.; that on their arrival the goods were placed in the defendants' freight sheds, and notice, addressed to the consignee, sent to the consignor at Newmarket, and also to the G. T. R. Co., that the defendants were prepared to deliver the goods for further conveyance and that, after such notice, while the goods were in the defendants' freight sheds they were destroyed by fire without any negligence on the defendants' part.

Held, that the defendants were not liable as carriers because they had expressly limited their liability as such, nor as warehousemen, for no negligence was shown; the only negligence suggested being that they did not furnish cars for transhipment before the fire, but that such objection was not tenable, and even if this could constitute negligence.

Quare (i), whether the recovery could be for more than nominal damages; (ii) whether the loss by fire was the damage naturally arising from such negligence.

Falconbridge, for the plaintiff.

Boulton, Q.C., for the defendants.

 CHANCERY DIVISION.

[BOYD, C., 7TH MAY, 1884.]

AMSDEN v. KYLE.

Will, construction of—Dower—Election.

A testator gave to his widow a one-third interest in all his real and personal estate as long as she should remain unmarried.

Held, that this imported equality of division, which would be defeated if the widow took her dower first, and therefore she was bound to elect.

[BOYD, C., 19TH JUNE, 1884.]

ELLIOTT v. STANLEY.

Joint covenant—Breach by one covenantor—Liability.

The defendants jointly covenanted with the plaintiff, who had bought their business, that they would not engage in a like occupation for a certain time in the neighbourhood. One of the covenantors did engage in a like business.

Held, that the covenant being joint, the engagement in a like business by one of the covenantors did constitute a breach.

[CAMERON, J., 1ST MAY, 1884.]

NIXON v. ASHENHURST.

Will, construction of—Devise in lieu of Dower—Election—Evidence of Election.

A testator gave to his widow for life the homestead, with sufficient furniture for her use, \$100 per annum, one cow and six cords of wood annually, all of which were to be in lieu of dower. The payments and provisions of the will in favour of the widow were charged upon lands devised to one of the testator's sons. The widow heard the will read and made no objection. She remained in the homestead after her husband's death for two years with two of her sons, used the furniture, and received some money from the sons. She several times joined in mortgages of lands devised to them at their request and without consideration.

Held, that she had by her conduct elected to take under the will in lieu of dower.

*In re HARVEY & MITCHELL.**Vendor and Purchaser Act—Equity of redemption—Dower.*

S. & S. took a conveyance of land as joint tenants, and made a mortgage back to G. for the balance of the purchase money. S. & S. conveyed direct to S., S. & M. as joint tenants without a bar of dower. S., S. & M. then agreed to sell to L. and others free from incumbrances. L. and others mortgaged the land to raise a portion of the purchase money. The mortgagee's solicitors, who also acted for L. and others in the purchase, then paid a sufficient amount to the solicitors of S., S. & M. to entitle L. and others to a conveyance free from incumbrances. The solicitors of S., S. & M., having in their possession a deed to L. and others ready to be delivered, and a discharge of G.'s mortgage, handed both to the solicitors for L. and others upon receipt of the purchase money, and several days afterwards both deed and discharge were registered. The conveyance from S., S. & M. to L. and others did not contain a bar of dower.

Held, that the wives of S. & M. had no inchoate right of dower in the lands.

On 2nd May, 1881, Robert Gilmor, surviving trustee of the marriage settlement of Catherine Crookshank Heward, who was entitled to the

equity of redemption in the lands in question and other lands, and C.J. Campbell, who held the legal estate by means of a satisfied mortgage assigned to him in trust to prevent a merger, conveyed the land in question to W. B. Scarth and H. J. Scott as joint tenants. On the same day Scarth and Scott mortgaged to Gilmor to secure payment of a portion of the purchase money. Scott was unmarried. The mortgage contained a bar of dower for Mrs. Scarth, and she executed it. These conveyances were registered on 23rd May, 1881.

On the 2nd May, 1881, a conveyance was made between Scarth and Scott of the first part, and Scarth, Scott and Manning of the second part, whereby, in consideration of a sum of money, Scarth and Scott conveyed or purported to convey to Scarth, Scott and Manning in fee simple as joint tenants, which conveyance was registered on 28th May, 1881.

On 7th July, 1882, John Lucas, Frank Albert Bowden and Magloire Delaplante, being entitled to a conveyance of the land free from incumbrances under a contract of purchase, mortgaged the land to Schreiber for the purpose of raising money to pay for their conveyances. This mortgage was registered on 19th July, 1882.

On 2nd August, 1882, Schreiber's solicitors, who were also acting for Lucas, Bowden and Delaplante, paid to the solicitors of Scarth, Scott and Manning the amount which entitled Lucas, Bowden and Delaplante to their conveyance free from incumbrances. The conveyance, dated 20th July, 1882, and a statutory discharge of the land from Gilmor's mortgage, dated 3rd July, 1882, were at the time in the hands of the solicitors of Scarth, Scott and Manning, who immediately handed them over on receiving the purchase money.

On the 4th August the conveyance and discharge were registered.

The conveyance from Scarth, Scott and Manning to Lucas, Bowden and Deleplante did not contain a bar of dower, nor did the wives of Scarth and Manning execute it.

By various mesne conveyances Harvey became entitled to the land, which he contracted to sell to Mitchell. The latter objected to the title on the ground that the wives of Scarth and Manning should have joined in the conveyance to Lucas and others to bar dower, and demanded a bar of dower from them.

The matter now came on by petition under the Vendor and Purchaser Act.

E. Douglas Armour, for the vendor, contended that, as the mortgage to Gilmor was outstanding up to the time of the agreement to sell to Lucas and others, Scarth, Scott and Manning never had anything but an equitable estate. When the solicitors of the latter received the purchase money and handed over the conveyance and discharge of mortgage, the conveyance took effect immediately by delivery, and passed all the equitable estate of Scarth, Scott and Manning. The discharge of mortgage did not take effect until registration, and therefore the legal estate was never in Scarth, Scott and Manning. There never was a right to dower, therefore, as R. S. O. cap. 126, sec. 1, gives equitable dower only when the husband dies beneficially entitled; *Leith*, R. P. Stat. 222.

Snelling, for the purchaser, contended that by the proper construction of the deed from Scarth and Scott to Scarth, Scott and Manning, Manning took as tenant in severalty; *Hayes Conv.*, 4th Ed. 96; *Leith's Williams Rl. Prop.* 137. When the agreement was made to sell to Lucas and others, free from incumbrances, that was an agreement to convey the legal estate, and by the event which happened the legal estate vested in Manning before Lucas and others became entitled to the land. Mrs. Manning was therefore entitled to dower. *Peirce v. Canavan*, 28 Gr. 356. At any rate had proceedings been taken on the Gilmor mortgage, the wives of the mortgagors would, by the practice, have been properly joined; therefore they should have joined in the conveyance to Lucas and others. He cited 42 Vict. cap. 22 (O).

Armour, in reply. The strict common law construction of the conveyance from Scarth and Scott to Scarth, Scott and Manning might have given Manning the land as tenant in severalty, but after *Corbett v. Harper*, 5 Ont. R. 93, the deed must be construed as a layman would read it, giving to technical terms their technical meaning. Hence the conveyance would make Scarth, Scott and Manning joint tenants, and there would be no dower, but if Manning took as tenant in severalty he would on the face of the conveyance be clearly a trustee for the others, and there would be no dower in his trust estate.

FERGUSON, J., 17th June, 1884.—When Scarth, Scott and Manning agreed to convey to Lucas, Bowden and Delaplante they had only an equity of redemption. If they had died beneficially entitled their wives would have been entitled to dower, supposing that no question of joint tenancy arose. But if they aliened the land in their lifetime the wives would lose any right to dower that they might have. I do not think that it remained for me to decide this, but I did decide it in *Re McIntosh v. Dumble*, 4 C. L. T. 209. The effect of the transaction by which their solicitors received the purchase money and handed over the conveyance and discharge of mortgage was this:—The conveyance took effect by delivery immediately, the discharge of mortgage did not take effect till registration. If the discharge had been registered before Manning's solicitors had handed over the conveyance, he, or he and his co-tenant, would have acquired the legal estate. When the discharge was in fact registered, Scarth, Scott and Manning had no estate, for it had passed by the conveyance to Lucas and others. I therefore declare that there is no right to dower, and the objection to the title is overruled.

IN CHAMBERS.

LANGTRY v. DUMOULIN.

Appeal—Delay—Extending time to appeal—Vested rights—Maintenance of action.

An extension of the time for filing an appeal bond to perfect a proposed appeal to the Court of Appeal, after the time had elapsed, was refused, where it appeared that the appellant on the record was not desirous of appealing, that the appeal was being carried on in his name by other parties, and neither excused the delay.

On the 24th June, *Osler, Q.C.*, (with him, *H. D. Gamble*) moved before the Master in Chambers on behalf of the defendant, the Reverend J. P. Dumoulin, the Rector of St. James' Cathedral, on notice to the plaintiffs and the other defendants for an order extending the time for filing the appeal bond, and to take off the files a former bond filed under the following circumstances:

The action was brought by the Synod of Toronto and some of the incumbents of churches in Toronto, other than St. James' Cathedral, against the Reverend J. P. Dumoulin, Rector of St. James' Cathedral, to recover the excess of the Rector's income over \$5,000 a year under several statutes.

On 1st March, judgment was pronounced in favour of the plaintiffs. Several defendants were in the same interest as the plaintiffs as against the defendant Dumoulin. One of them, the Reverend Arthur H. Baldwin, entered an appearance in person, and delivered a statement of defence submitting his rights and interests to the protection of the Court. He was not represented by solicitor or counsel at any subsequent proceeding in the action. On 4th March, the defendant Dumoulin served notice of appeal to the Court of Appeal on all the parties represented by solicitors, but did not serve the defendant, the Reverend A. H. Baldwin. On 30th May the defendant Dumoulin's solicitors filed an appeal bond executed by the Churchwardens of St. James' Cathedral, as a body corporate under 39 Vict. cap. 92 (O), and 42 Vict. cap. 92 (O), without the appellant on the record being a party thereto. On the same day a motion was made for the allowance of this bond, on notice to the other parties, which was dismissed as irregular, inasmuch as the rules provide that an appeal bond shall be considered as allowed if not moved against within fourteen days after filing. On 11th June an order was made by the Master in Chambers, on motion of the plaintiffs, disallowing this bond on the ground that it did not comply with the Statute and rules of Court respecting appeal bonds. On the same day a bond was filed, executed by the appellant on the record, the defendant Dumoulin, but notice of filing was not served on the other parties. On 13th June a notice of the present motion was served returnable before the Master in Chambers.

The affidavit of O. A. Howland, in support of the motion, showed that he was one of the Churchwardens of St. James' Cathedral; that the vestry was advised that the Rector was trustee for the vestry of the lands

in question in the action, and the income thereof; that the defence had been carried on in the name of the Rector of St. James' Cathedral, the defendant Dumoulin, and with his consent, by the Churchwardens, pursuant to a resolution of the vestry; that the Rector had declared that he would administer the fund for the benefit of the vestry if he succeeded in the litigation; that a few days before the 29th May the Churchwardens submitted a bond to the Rector, indemnifying him against the costs of the litigation, which the Rector had demanded as a condition of allowing his name to be used on the appeal; that the Rector not being aware of the urgency of the matter left town, and they were not aware of his address and could not communicate with him until after the time had elapsed for giving security.

On cross-examination, Mr. Howland produced the minute book of the vestry, from which it appeared that on the 25th March a special meeting of the vestry was held, at which the defendant Dumoulin made an address to the vestry, in which he stated that his feeling was that the judgment for the plaintiffs might well be accepted as the settlement of the case, and advised them most strongly to cease the litigation. He proceeded, "If, notwithstanding all this that I have said, you still coerce an appeal, it is but right that you should be ready to assume the whole burden and responsibility of it. For my part, I will disclaim all responsibility, both moral and material. In fairness to my name and character as a Christian minister, it must be fully understood and known that that name is used in these law proceedings only legally and officially and against my personal feelings and advice, and I must also call upon you before giving notice of appeal to indemnify me against personal liability for all costs incurred or to be incurred in this case." A resolution was then passed by the vestry in favour of appealing, and relieving the defendant Dumoulin of all liability. Mr. Howland stated that all the costs of the litigation so far had been borne by the vestry and not by the defendant Dumoulin; that after the vestry meeting of 25th March, he met defendant Dumoulin several times and endeavoured to come to some agreement as to the disposition of the funds in question in case the appeal was successful; that two agreements were prepared and submitted to the defendant Dumoulin who would not accept them; that he did not wish to ask him to sign the appeal bond until the matter of the future disposition of the fund, in case of success, was settled between them; that he saw him on Wednesday, 28th May, and on Friday, the 30th, he found that he had left town; that the bond of the Churchwardens was then drawn and filed, without the signature of the appellant; that he knew it was irregular when filed; that the defendant Dumoulin had never been asked to sign the appeal bond until he had returned to town—about 11th June.

The defendant the Reverend J. P. Dumoulin was examined and stated that he was under no obligation to his vestry with respect to the future distribution of the fund in case of success; that he had been asked to execute an agreement respecting the fund, but refused to do so; that he proposed to retain personal control over the fund, but would feel morally bound to consult his vestry as to the distribution of it; that he made it a

condition of the appeal that he should be indemnified against costs; that he was never approached by the Churchwardens on the business of appealing, nor asked to sign an appeal bond until his return to town about 11th June, after the time for filing an appeal bond had elapsed.

In answer to the application an affidavit was filed showing that no notice of appeal had been served on the defendant the Reverend A. H. Baldwin.

Alfred Hoskin, Q.C., for the Rectors of the Township of York, defendants, objected to the jurisdiction of the Master in Chambers to extend the time. By G. O. 560, which defined the jurisdiction of the Referee in Chancery Chambers, applications for leave to appeal or re-hear after the time limited for that purpose had elapsed were expressly excepted from the jurisdiction of the Referee, and upon the principle of *Keefe v. Ward*, 9 P. R. 220, the Master in Chambers had not jurisdiction.

The motion was then argued on its merits by *Moss, Q.C.*, and *Walter Barwick*, for the plaintiffs, and *E. Douglas Armour*, for defendants in the same interest with the plaintiffs.

On 25th June, the Master in Chambers held that the question of his jurisdiction was so doubtful that he would enlarge the motion before a Judge in Chambers.

On 30th June, the motion came on for argument before the Chancellor, notice of the motion having in the meantime been served upon the defendant the Reverend A. H. Baldwin.

Osler, Q.C., (*H. D. Gamble* with him) contended that the vestry of St. James' Cathedral had an interest which entitled them to maintain the appeal; that the rules of the Court of Appeal gave three months, or such further time as the Court appealed from, or a Judge thereof, might allow. Though some of the decisions laid down strict rules as to bringing appeals within the time limited the rule was somewhat relaxed now, and in an important case the leave might well be granted. The defendant, as rector, was only tenant for life and it was important that an appeal should be had on that ground. He cited the judgment of Bowen, L. J., in *Re New Callao*, L. R. 22 Chy. Div. 484; *Lewis v. Talbot St. Gravel Road Co.*, 10 P. R. 15.

Moss, Q.C., (*Walter Barwick* with him) contended that the appeal was not desired by the appellant on the record; that the churchwardens of St. James' Cathedral were maintaining an action in which they had no interest whatever, for the fund in question was either the private property of the Rector, the defendant Dumoulin, or it belonged to the plaintiffs; that the Court should not grant an indulgence to a person maintaining an action; that the delay had not been excused either on behalf of the defendant Dumoulin who in fact, not desiring to appeal, did not want to excuse it, nor by the churchwardens, who did not ask the appellant on the record to sign the appeal bond until after the time for filing it had elapsed. He cited *Bradlaugh v. Newdegate*, L. R. 11 Q. B. D. 1; *Reynell v. Sprye*, 1 DeG. M. & G. 680; *Hutley v. Hutley*, L. R. 8 Q. B. 112.

Alfred Hoskin, Q.C., for the defendants the Rectors of the Township of York, *C. H. Greene*, for the defendant A. H. Baldwin, and *E. Douglas Armour*, for defendants in the same interest as the plaintiffs were not called upon.

Osler, Q.C., in reply.

BOYD, C.—30th June, 1884.—There is a clear line of decisions respecting leave to appeal which the Courts adhere to. They are of two classes. First, where there is unavoidable accident, whereby a party is unable to bring on his appeal; secondly, where some equity is raised on behalf of the appellant from the conduct of the other side. The appellant brings himself within neither of these classes. This case is somewhat historical from the notoriety which has always attended it, and there has been great delay in getting even as far as it has proceeded, and the Court will not be astute in prolonging the matter when an indulgence is sought.

There is no case whatever made against the defendant the Reverend A. H. Baldwin, who is interested. The judgment is absolute as far as he is concerned and he has vested rights under it which should not be lightly disturbed. It is not a case for indulgence. The parties were litigants at arms' length, and a good deal of acerbity was shown in carrying on the litigation, and the counsel or solicitors on either side would not be likely to overlook a mistake on the other side. It is not a desirable thing to prosecute the appeal piecemeal, and it is not desirable to let the Court of Appeal deal with it in fragments, as must be the case if the appeal were to go on without the defendant A. H. Baldwin.

The case is peculiar. The party appealing does not show prejudice, nor explain the delay; the defendant Dumoulin assented to the judgment as a righteous judgment; and I know that Mr. Justice Ferguson, who tried the case, took a strong view of the law. It is not like the case of a doubtful decision in which the judge who tried it would like his judgment to be reviewed.

I am not concerned as to whether there is a champertous agreement or whether the action is maintained by the churchwardens. I do not say whether they have or have not the right to maintain the action. It is evident that the appellant put forward is not the real appellant. He communicated his position to the vestry; and when it took the shape it did it lay upon the churchwardens, whether they were right or not, to take every step very carefully in order to perfect the appeal. If they intended to proceed under the defendant Dumoulin's name they should have been very careful how they did proceed.

The statute and rules give a certain limited time for taking each step in appeal. The statute is plain and the rules of Court are distinct that the bond must be executed by the appellant. It was useless to put a bond on file without the appellant's signature. They should have applied at once for a relaxation of the rule when they found they could not obtain his signature in time. Then there was further delay. This application might have been made nearly a month ago. There is no excuse offered except the motion to the Master in Chambers. It would be putting a premium on inertness to allow an appeal now. No explanation is offered by any one. The appellant does not and cannot offer any excuse, for the circumstances show that he does not desire to go on with the appeal.

The appeal is unmeritorious. All the parties on the record are satisfied with the judgment, and it would be unmeritorious to grant the indulgence asked to strangers to the record.

The motion is dismissed with costs.

[ROSE, J., 29th APRIL, 1884.]

Re FRIENDLY v. NEEDLER.*Division Court—Prohibition—Discretion.*

A defendant entered a notice disputing the plaintiff's claim in a Division Court suit, and objecting to the jurisdiction of the Court, but did not appear at the trial when the Judge, upon proof of the plaintiff's claim and such facts as in the absence of proof to the contrary established a *prima facie* case of jurisdiction, entered a judgment in favour of the plaintiff.

Held, following *Archibald v. Bushey*, 7 P. R. 304, that the granting of a prohibition under the circumstances was discretionary; that it would be unfair to place upon the Judge trying the case the burden of cross-examining the witnesses to ascertain whether he had jurisdiction; that if a *prima facie* case of jurisdiction was made out the defendant was himself to blame if it was not displaced, and as neither a good defence on the merits was shown, nor dispatch used in making the application, the motion was refused with costs.

Walter Read, for the motion.

Hands, contra.

ROSE, J., 3RD JUNE, 1884.

HILLIER v. ARTHUR.

Setting aside judgment at trial—Rule 270.

The plaintiff not appearing at the trial, judgment was directed to be entered for the defendant with costs. Application was subsequently made to the learned judge during the same assizes to set aside the judgment and to reinstate the case on the list. This was refused, the plaintiff not being then ready to go on. Application was then made by the defendant to the Master in Chambers, under Rule 270, to set aside the judgment entered at the trial. The motion was enlarged before Rose, J., in Chambers, who

Held, that Rule 270 does not give jurisdiction to the Master or a Judge in Chambers to set aside a judgment.

W. H. P. Clement, for the motion.

Aylesworth, contra.

[THE MASTER IN CHAMBERS, 3RD JUNE, 1884.]

In re FITZGERALD, a Solicitor.*Bills of costs—Delivery and taxation—Præcipe order.*

Upon a motion in Chambers for an order for the delivery and taxation of a solicitor's bills of costs relating to certain proceedings under a mortgage.

Held, that the Chancery practice of obtaining such orders on præcipe was the more convenient one and should prevail in all divisions of the High Court.

Holman, for the motion.

W. H. P. Clement, contra.

PRIVETT v. PEARSON.

Defence—Extension of time for—Demurrer—Amendment—Costs of demurrer.

The defendant's solicitor had asked for, and obtained from plaintiff's solicitor, further time to put in his defence. After the time specifically given had expired, but before the plaintiff had taken any new step, the defendant filed a demurrer to the statement of claim.

G. W. Meyer moved to take this demurrer off the files on the ground that it was filed after the time allowed by Rule 191, that the further time granted for filing a statement of defence had expired, and that the consent given did not extend to a demurrer.

W. Seton Gordon, contra.

THE MASTER IN CHAMBERS, 5th June, 1884.—Defence includes demurrer. Had the defendant obtained an order in Chambers to extend the time for delivering a statement of defence, he could regularly have filed a demurrer within that time. Here no order was got, but the consent was of the same import. The cases of *Boulbee v. Cameron*, 2 Chy. Cham. 41, and *Chamberlain v. McDonald*, *Ibid.* 204, no longer apply. See *Hodges v. Hodges*, L. R. 2 Ch. D. 112.

Subsequently the plaintiff gave notice that he submitted to the demurrer, and tendered to the defendant's solicitor the sum of four dollars as the costs of the demurrer; he then moved for leave to amend.

THE MASTER IN CHAMBERS held that the plaintiff must pay taxed costs of the demurrer, and that the old practice which fixed four dollars as the costs of a demurrer submitted to, was no longer in force.

MANITOBA

In the Queen's Bench.

WHITHAM v. COOPER.

Fraudulent preference—Consent to judgment—Injunction—Staying proceedings at law.

An injunction was granted, to continue to the hearing, restraining the defendant from proceeding to enforce a collusive judgment and execution thereon obtained against one N., a debtor of the parties to the suit.

The defendant, Joseph Nixon, carried on business in Winnipeg, and in course of business became indebted to the plaintiffs and others for various sums, and gave notes and acceptances therefor.

The plaintiffs were creditors of Nixon, and they filed their bill of complaint on behalf of themselves and all other creditors of Nixon, whereby they alleged that on the 19th day of January the defendants, Cooper & Smith, issued a writ of summons out of the Court of Queen's Bench against the defendant Nixon for the recovery of the sum of \$3,825.95 on a promissory note, purporting to be dated on the 17th day of January last, payable to the defendants on demand. It was further alleged that a copy of the writ was served upon a clerk in the office of the plaintiff's attorney in that action, and an acceptance given in the name of the defendant's attorney; that an appearance was forthwith entered, the declaration filed, and service thereof effected in the same manner as the writ; and the defendant's attorney at once pleaded. That an order was then obtained by the plaintiff's attorney with the consent of the defendant's attorney, striking out the defendant's pleas, whereupon judgment was signed, and execution issued and was placed in the hands of the sheriff. The whole of the proceedings were taken on the same day, between the hours of two and four o'clock in the afternoon. The plaintiffs charged connivance and collusion on the part of the defendants in recovering the judgment, for the purpose of defeating and delaying the other creditors of the defendant Nixon; that the judgment was recovered on a demand note on which no demand for payment was ever made; that the proceeds of the sale of the goods and chattels of the defendant Nixon would not be more than sufficient to cover the claim of the defendants Cooper & Smith; and the plaintiff prayed that the judgment and executions of the defendants Cooper & Smith might be set aside, and for an injunction restraining them from further proceeding thereunder.

The plaintiffs obtained an interim injunction and now moved to continue it until the hearing. The defendants denied the fraud and collusion charged in the bill, and claimed that the plaintiff had taken similar proceedings to

their own and had actually recovered judgment and issued execution against the defendant Nixon but by the superior diligence of the defendants' attorneys their executions were first placed in the sheriff's hands.

McArthur, Q.C., for the plaintiff.

Mulock and Morphy, for defendants Cooper & Smith.

TAYLOR, J., 14TH FEBRUARY, 1884.—On the best consideration which I have been able to give this case in the short time at my disposal, I am of opinion that the injunction should be continued.

It is true there may be some difficulty about the position of the plaintiffs, they having themselves recovered judgment against Nixon upon a consent signed by his attorney to withdraw pleas filed and allow final judgment to be signed. But this judgment they are willing to abandon. A plaintiff may, as I understand the practice, waive judgment which he has obtained in an irregular or improper manner.

The Bill here is filed on behalf of the plaintiffs and all other creditors of Nixon, and if relief is obtained it will accrue to the benefit of all the creditors.

The cases decided in Ontario, under the corresponding statute there as to fraudulent preferences, are strongly relied on by the defendants, and they certainly go a long way towards supporting their position; yet these cases do not, so far as I have been able to examine them, go quite so far as it seems to be supposed they do.

The first case, *Young v. Christie*, 7 Gr. 312, was a case in which a debtor, sued by two persons, defended one suit and in the other allowed judgment to go by default. *McKenna v. Smith*, 10 Gr. 40, was another case in which the same thing happened. In *Labatt v. Bixel*, 28 Gr. 593, the debtor defendant defended one suit, and only entered an appearance in the suit brought against him by his son, which enabled the latter to get an earlier judgment. In *Heaman v. Seale*, 29 Gr. 278, the debtor entered an appearance and filed pleas in the suit first begun against him; in the second action he entered appearance and filed pleas, but on the same day that the latter were filed he signed a *relicta verifications*, after which the plaintiff signed judgment and issued execution. Proudfoot, J., held that the judgment did not offend against the statute, saying a *relicta verifications* is neither a confession, nor a cognovit, nor a warrant of attorney, and is therefore not prohibited by the statute.

Davis v. Wickson, 1 Ont. R. 369, was a case in which an order was obtained in Chambers on consent, striking out the defence and giving leave to enter up judgment. Although in that case Chancellor Boyd says that he does not think that the plaintiff could have successfully attacked the judgment recovered by Wickson against Foster, yet that is a mere observation of the learned judge, for he had previously said that, for the purpose of deciding the question before him, it became unnecessary to express any opinion upon the validity of the judgment recovered by Wickson against Foster.

The question came before the Queen's Bench Division of the High Court of Justice in Ontario in *Turner v. Lucas*, 1 Ont. R. 623. In that case the debtor's solicitor in one of two suits brought against him, gave a consent

to an order striking out the statement of defence and giving leave to sign final judgment whereby priority was gained over another.

The question came up first on an interpleader issue in which the one who so obtained judgment was defendant. Burton, J. A., before whom it was tried, gave judgment in his favour, but stated that he would have given judgment in favour of the plaintiff had he not felt bound by authority. On a motion to set aside the judgment, Chief Justice Hagarty and Mr. Justice Cameron gave no judgments, contenting themselves with concurring in the judgment of Mr. Justice Armour. The latter gave judgment discharging the rule *nisi*, because the authorities had limited the words "Confession of Judgment," "*Cognovit actionem*," "Warrant of attorney to confess Judgment," strictly to the instruments known as such at the time of the passing of the Act. He, however, expressed a most decided opinion that, had the matter been *res integra*, he would have held that where a debtor had actively interfered to enable a creditor to recover a judgment against him sooner than he would have recovered it by the ordinary course of law without such interference, such defendant was giving a confession of judgment within the very words of the Act, and certainly within its spirit, and was doing the very thing aimed at by the Act.

The Judges who decided the earlier cases never contemplated or intended to deal with cases in which the debtor took active steps to enable the creditor to recover judgment. In *McKenna v. Smith*, Chancellor Vankoughnet said, "While the Act endeavours to prevent the debtor himself when in insolvent circumstances from helping a particular creditor by any act of his own to a portion of his property, it leaves it open to any such creditor by active proceedings on his part, the debtor being passive, to sweep away the whole estate from all the other creditors."

The whole question is one which in my opinion well deserves further consideration, especially when, as here, we are not trammelled by authorities binding upon us, however much we may be inclined to respect them. I am the more prepared to continue the injunction for the purpose of having the question further considered in that the evidence leaves on my mind the strong impression that the defendants' judgment was not only procured by the active co-operation of the debtor, but that it was at first, at all events, intended to be the means of protecting him against his creditors, and enabling him to continue his business.

The injunction should therefore be continued.

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ON THE NATURE AND PRACTICE OF COUNTER-CLAIM.

THE system of pleading and procedure introduced by the Ontario Judicature Act, 1881, in substitution of those theretofore in use by the Courts in this Province, contains few features more important than its provisions in reference to defences. Not only does it recognize and adopt to their full extent the established principles of set-off, both legal and equitable, as well as such limited statutory rights for the simultaneous trial of claim and cross-claim as existed at the time of its passage, but it so liberally amplifies these rights and remedies, that the new patches seem of greater extent than the original garment.

The advance, however, is upon lines of procedure reform already laid down in prior enactments and established rules.

Set-off, under the common law jurisdiction, was the creature of statute. Prior to the Act of George II. (a), it was unknown. Up to that time (save in bankruptcy cases) (b) the issues were restricted to the legal validity of the plaintiff's cause of action alone, as shown in the declaration. The defendant was held down to a mere *defence*, and was not at liberty to import into the litigation the consideration of matters not necessary to assist him in proving that

(a) 2 Geo. II. cap. 22, sec. 13.

(b) By 4 & 5 Anne, cap. 4.

the plaintiff's demand against him could not be sustained. He could not make any independent cross-claim against the plaintiff, but might be compelled to suffer judgment to go against him in full, even where the plaintiff was, in fact, indebted to him upon other transactions between them. Upon the latter he was left to bring his separate action against the plaintiff, or in certain cases to have recourse to equity to obtain an injunction to restrain the action at law. Nor was the relief afforded the defendant by the statute of George at all extensive. It did not apply to actions other than those of debt, covenant and assumpsit for non-payment of money, and the demand was required to be liquidated, and such as might have been made the subject of one of those actions (c). General damages could not be set off, and the debt sued for and that sought to be set off were required to be mutual and in the same rights. A set-off established in excess of the plaintiff's claim would merely defeat it, and would not avail to secure the defendant a judgment for the balance.

In the equity system of pleading the right to set off mutual debts was recognized and enforced long before the Common Law Courts were given jurisdiction. The principle here has been traced back to the civil law doctrine of *compensation*, and was not dependent upon any statutory authority (d). It was altogether a wider remedy and was resorted to in some cases by cross-bill, and in others by answer. Still, the equitable doctrine did not extend so far as to entitle the defendant to set off upon the mere ground of a cross demand. It was, as a rule, limited to such claims, actually due and not accruing due only, as were connected with the matter of the plaintiff's claim. But though connected, if of a purely legal nature, such demands could not be set off in equity. The debts had still, as at law, to be in the same rights, and liquidated; unless, indeed, special circumstances, as of fraud, might justify a departure from the rule.

Set-off existed in equity where the defendant sought to plead a demand involving an equitable element, or resting

(c) Tidd's Pr. 596.

(d) *Freeman v. Lomas*, 9 Ha. 112.

upon an equitable ground for impeaching a legal demand, or where both demands were equitable. One ground for permitting the exercise of the right was that an agreement existed, or might be presumed to exist, between the parties that the one demand might be set off against the other, and the Court favoured the reception and construction of evidence tending to prove such an agreement. Another ground was the clear natural connection between the claim and cross-claim, as where both originated from one transaction. In this case the Court would interfere to prevent one party from enforcing his claim, unless upon terms of allowing the consideration in the same action of the cross-claim of the other, even although the latter claim might be unliquidated (e). The remedy could be enforced, if necessary, by injunction to restrain the action at law. Where the cross-bill was filed, the issues raised by it were tried at the same time as those of the original bill,—similarly, of course, where the cross-claim was raised by answer.

It is thus seen that the practice in equity in this particular not only forestalled that at law, but was, from the beginning, more complete and serviceable. It is this more developed practice which the framers of the Judicature Act have selected and extended.

The extension appears to be in this, that now, apart from any agreement, real or fictitious, that the cross demands should be set off, the absolute right is conferred upon the defendant to have a balance struck upon the result of a simultaneous trial of the plaintiff's claim against him and his claim against the plaintiff, and judgment given for the party in whose favour such balance may be found. No longer is the defendant limited to a simple defensive contest upon the issues tendered by the plaintiff or to pleading a liquidated set-off; but he may, without going outside the litigation in which he is attacked, bring up in his turn any manner of claim he may have against the plaintiff, whether liquidated or not, and the defendant's claim may be one not actually due at the date of the writ (f). If his claim is

(e) *Kerr on Inj.* 64-68.

(f) *Ellis v. Munson*, 35 L. T. 585; *Beddall v. Maitland*, 17 Chy. D. 174; *McGowan v. Middleton*, 11 Q. B.D. 469.

against the plaintiff jointly with another person, he may introduce that other as a party (g).

Where the defendant's claim is against the plaintiff alone, the words of the statute seem wide enough to include any claim, of whatever nature, provided only it is one upon which he could formerly have brought a suit at law or in equity against the plaintiff. It will be hereafter noticed, however, that in practice a more limited construction has been put upon this right. Where the claim is against a third person as well as the plaintiff, the statute itself limits the right to claims in some way connected with the plaintiff's claim. Cases of indemnity and remedy over against a third party alone are not strictly cases of counter-claim, and need not here be considered.

Over all is the power reserved to the Court to restrict the right of counter-claim in any case where, in the opinion of the Judge, claim and counter-claim cannot conveniently be tried together (h).

The first thought likely to arise in the mind of a practitioner accustomed to the old methods of pleading is one of doubt whether, in permitting the lumping in one suit of different causes of action and cross-action between original and third parties, or even between original parties alone, confusion is not likely to result which it would be preferable, even at some cost, to avoid, and of apprehension lest the simultaneous trial of numerous complicated questions may only overburden and confuse the mind of judge or jury, the result being to render impossible a sufficiently careful consideration of the issues raised. Evidence of this is not wanting in the expressions of Judges who have been called upon to decide what limits should be put to the exercise of the right. We are told by Lord Mansfield that the reason why the Common Law Courts anciently denied the right of set-off was "for the sake of forms of procedure, and convenience of trial" (i); and expressions in older authorities convince us that the danger of attempting to accomplish

(g) Sec. 16, s-s. 4.

(h) Rule 127.

(i) *Green v. Farmer*, 4 Burr. 2214.

too much in one litigation is one recognized almost from the beginning (*j*). But it is undoubtedly the case that for a very long period the steady growth of pleading has been in the direction of an increasing number and greater complexity of the issues produced for simultaneous adjudication. Thus, even before the C. L. P. Act, several causes of action might be joined in the same declaration, and indeed in the same count of the declaration. At first, there was still the limitation that only demands of a similar quality or character could be joined (*k*). But the C. L. P. Act, sec. 78, abrogated this limitation and permitted causes of action of whatever kind to be joined in the same suit, save only in replevin, ejectment, and in some County Court actions. There was still the power of the Judge to interfere where injustice was likely to be done or great complexity to arise. So, as to defences. The rule against duplicity for a long time denied to the defendant the right to plead more than one plea to each count of the declaration. Then by statute (*l*) he was permitted to plead "as many several matters thereto as he shall think necessary for his defence." The statute required the leave of the Court to be got, and at first this was refused where the several proposed pleas appeared to be inconsistent. After a considerable period this rule was relaxed, save only in one or two instances. It was then noticed that the statute of Anne applied to pleas only, and what Mr. Stephen (*m*) calls the "remarkable effect" was produced that while the defendant was permitted the advantage of several pleas, to each of which the plaintiff might desire to reply several answers, the latter was still obliged to make his election between his several answers, and to reply but one of them to each plea. To remedy this the C. L. P. Act (*n*) permitted the plaintiff to

(*j*) Cavendum tamen ne tales (actiones uno libello) cumulentur quæ sibi invicem contrariæ sunt . . . Non etiam cumulandæ plures actiones ex eâdem causa, et ad idem tendentes, nec plures actiones contra diversos, ex diversis causis, debitores, etc. Voet. ad Pandectas. Lib. ii. Tit. xiii. sec. 14.

(*k*) Bac. Abr. Tit. Actions (C).

(*l*) 4 Anne cap. 16, sec. 4.

(*m*) Stephen Pl. 302.

(*n*) C. L. P. Act, 1856, sec. 110.

plead double upon obtaining the leave of the Court; and permitted similar relief to both parties in subsequent pleadings. Then, as now, the safeguard lay in the discretion of the Judge in allowing or striking out the pleadings, the danger to be provided against being the overloading of the record with frivolous or immaterial matter, and the incurring of great expense and intricacy at the trial.

It is thus seen how completely, though at the same time how reluctantly, was abandoned the fundamental rule or principle of Common Law pleading, viz., that every dispute could with justice to the litigants be reduced to a single issue; and also, how step by step the rules established to restrict the number of issues likely to be raised by the pleadings, and hence the complexity of the litigation, were abandoned. Now, nearly all are swept away.

Opposed to the narrow and somewhat cramped system to which long continued adherence to the first mentioned and similar doctrines tended to give rise, the equity system of pleading presented, both in its general outline and in its numerous special features, advantages which are now recognized by their general adoption, almost without change, in the statute we are considering. Foremost among them was the constant aim of the Court to do complete justice and settle once for all, in one action, the rights of all parties interested in the subject matter of the litigation (o). The present principle respecting third parties was recognized and enforced, by requiring not only that all those who were primarily interested should be before the Court ere the latter would feel called upon to determine the questions at issue, but also, that those consequentially interested in defeating the plaintiff's demands should be joined as parties, "because the success of the plaintiff against the defendants who are immediately interested may give those defendants a right to proceed against them for the purpose of compelling them to make compensation, either in the whole or in part, for the loss sustained" (p). Also, where the plaintiff's demand was against defendants

(o) Dan. Pr. 290.

(p) Dan. Pr. 244.

jointly liable who "are entitled to a contribution where one pays more than his share of the debt" (q). Also, where the defendant has a *remedy over* against another, "to avoid multiplicity of suits" (r). The Court required that the bill should be brought for the whole subject matter, and not for part of it only. If the plaintiff had two distinct claims against the same defendant, he was required to bring both, if both were "proper for one account" (s), and if the whole matter was capable of being immediately disposed of. The defendant's objection for want of proper parties could be taken by demurrer, plea, or answer, or even at the hearing, where the Court itself, of its own motion, could refuse to proceed in the absence of those parties whose presence was necessary for complete justice to be done. There was no distinct rule laid down as to what constituted multifariousness, or the embracing in one bill of too many objects for relief. Convenience in each particular case, under all the circumstances of that case, alone guided the Court. Similarly, as to misjoinder, where the claims were of so different a character that justice would not be served by permitting them to be litigated in one suit. But causes might be consolidated for the purpose of simultaneous trial where the same or similar accounts were to be taken in each.

Counter-claim is thus perhaps less an extension of the doctrine or right of set-off, than of the principles of Equity Courts to encourage the final disposition in one action of the rights and liabilities of all parties to a transaction, or to connected transactions. It would appear from some of the cases that certain Judges consider set-off and counter-claim as distinct; but upon this point, as upon others relating to the general subject, contradictory decisions are to be found. Defence and counter-claim are distinct, and set-off partakes more of the nature of defence than it does of counter-claim. There are authorities that a counter-claim is not part of the original action, but is a wholly independent proceeding which for convenience is tried

(q) Dan. Pr. 244.

(r) Dan. Pr. 282-3.

(s) *Ibid.* 317.

together with it (*t*). There seems no reason why it may not be so considered, as it can only be brought for a matter for which an action would lie (*u*); and where the original claim is dismissed or stayed, the counter-claim may proceed to trial. It is governed by the same rules as a claim in respect to what causes of action may be joined in it (*v*). And it has been so far treated as a separate action that a revivor of the claim, upon the death of the defendant, has been held not to authorize a prosecution of the counter-claim, without a separate order (*w*). Security for costs may be ordered in respect of it (*x*). Its form is that of a statement in an independent action, even the style of cause being different from that of the claim. It must contain in itself a sufficient statement of the facts upon which the claim for relief is founded (*y*). The pleadings and the issues upon the counter-claim are distinct from those in the original action (*z*), though the same pleading may possess at one time several characters, and it has become the practice to conclude first the trial of the claim, before entering upon the trial of the counter-claim. but the mode and time of trial are discretionary with the Court (*a*).

To take the simplest case of counter-claim, that, namely, against the plaintiff alone, the point which has most frequently arisen for discussion has been with reference to the nature of the claims which may be set up. It has been noticed that the statute permits any claim to be brought forward, it being open to the plaintiff to move to disallow the counter-claim. Upon this question of the allowance or exclusion of the counter-claim, the Judge of

(*t*) *Baines v. Bromley*, 6 Q. B. D. 695; *Gathercole v. Smith*, 7 Q. B. D. 626.

(*u*) *Rawley v. Rawley*, 1 Q. B. D. 460; *Birmingham Estates Co. v. Smith*, 13 Chy. D. 506; *Pellas v. Neptune*, L. R. 5 C. P. 34.

(*v*) *Compton v. Preston*, 21 Chy. D. 138.

(*w*) *Andrews v. Aitken*, 21 Chy. D. 175.

(*x*) *The J. Fisher*, 2 P. D. 115; *Winterfield v. Bradburn*, 3 Q. B. D. 324.

(*y*) *Crowe v. Barnicott*, 6 Chy. D. 753. But see *Lees v. Peterson*, 7 Chy. D. 866.

(*z*) *Canadian Securities Co. v. Prentiss*, 2 C. L. T. 90.

(*a*) *Re Woodfine*, 38 L. T. 753.

first instance is permitted to exercise a wide discretion. While his ruling is subject to appeal, the Court will not interfere with it, except in a very strong case (b). In the early case of *Quinn v. Hession* (c), the plaintiff claimed damages for slander, and the defendant counter-claimed damages for prior slander by the plaintiff, and the counter-claim was held good. But in *Cappeleus v. Brown* (d), Quain, J., while allowing a counter-claim for damages upon a different contract from that sued on, intimated that he would not allow claims very dissimilar in their nature to be tried together, as if damages for seduction were sought to be set off against the plaintiff's claim for damages for assault and battery. But mere dissimilarity of the claims would seem hardly to justify the disallowance of the counter-claim, and in the case instanced, if the assault were nearly contemporaneous with and induced by recent discovery of the seduction, and the witnesses in each case were the same, the latter might be thought, not unreasonably, a proper subject for counter-claim.

Something like this was suggested, but not approved, in *Lee v. Colyer* (e), where the defendant, a tenant, in the course of a discussion with his landlord, the plaintiff, as to certain repairs which he considered the landlord should make, assaulted the plaintiff and called him opprobrious names. The plaintiff claimed damages for the assault and slander, and the defendant counter-claimed for breach of the agreement to repair. The Master refused to strike out the counter-claim, on the ground that the assault took place when the parties were disputing about the non-repair. But Quain, J., struck it out on the ground that the matters were not really connected, and the fact that the assault took place when the parties were disputing about the non-repair made no difference. In this case, the witnesses may not have been the same; but, in

(b) *Huggons v. Tweed*, 10 Chy. D. 359; *Golding v. Wharton Salt Works*, 1 Q. B. D. 374.

(c) 40 L. T. N. S. 70.

(d) W. N. 1875, 231.

(e) W. N. 1876, 8.

any event, the case is not an authority that mere dissimilarity is a ground for excluding the counter-claim. The plaintiff in *Atwood v. Miller* (f), claimed for rent, and the defendant claimed a set-off for the price of butcher's meat delivered, and counter-claimed for damages suffered by him as tenant through breach of the landlord's agreement, and also for specific performance of an agreement to grant a lease. The Master at Chambers refused to hold that these questions could not be conveniently tried together, and Lindley, J., assented that the plaintiff was not embarrassed. But in another action for rent, a counter-claim for libel was disallowed (g). In *Lees v. Peterson* (h), the claim was for a partnership account, and the counter-claim for damages sustained by reason of the improper issue of a *ne exeat*, and it was admitted the counter-claim was good. In *Besant v. Wood* (i), the claim was to enforce a separation deed, and the counter-claim for a judicial separation, and the latter was held good. So in *Dockstader v. Phipps* (j), claim for possession and mesne profits, counter-claim for damages for wrongful distress; the latter was held good. But where there appears strong probability that the jury would become confused and fail to distinguish the issues properly, the counter-claim will be struck out (k). It is a branch of this doctrine of convenience of trial that the counter-claim must not set up claims against the plaintiff in different rights (l).

It follows from what has been said as to the nature of counter-claim, that the right must be exercised against the plaintiff himself; it must be the defendant's claim against the plaintiff, and not against another party (m). Yet, an apparent exception to this principle is shown in those cases where the plaintiff sues as assignee of a *chose in action*, and it is sought to set off claims which might be proper against

(f) W. N. 1876, 11.

(g) *Rotheram v. Priest*, 28 W. R. 477.

(h) *Supra*.

(i) 12 Chy. D. 605.

(j) 2 C. L. T. 91.

(k) *Nicholson v. Jackson*, W. N. 1876, 38.

(l) *Macdonald v. Carrington*, 4 C. P. D. 28.

(m) *Bowyear v. Pawson*, 6 Q. B. D. 540.

the assignor, were he the plaintiff. Thus, in *Exchange Bank v. Stinson* (n), Macdonald, the plaintiff's assignor, had, in pursuance of contracts with the defendant, delivered to the latter certain lumber, for which the plaintiff claimed the contract price. The defendant claimed to set off damages for the delivery of stuff inferior both in quality and size to that which the contract called for, and also damages for the non-delivery of large quantities of timber and staves. At the trial, Cameron, J., held that the set-off was good as to the former claim, but not good as to the latter. The Divisional Court of Common Pleas held that both grounds of damage were properly raised, Osler, J., doubting that "the right to counter-claim in respect of damages is conferred or strengthened by, or is at all dependent upon, Rule 127." In these cases, where, namely, the counter-claim is against an assignee of a *chose in action* it may avail as a set-off to the amount of the plaintiff's claim, but cannot avail to enable the defendant to recover judgment against the assignee for any excess of the amount of the counter-claim over the plaintiff's claim, so as to leave a balance due in the defendant's favour (o). A similar case is *Macdonald v. Bode* (p), where the action was brought on a bill of exchange. The defendant set up that one Alexander was the drawee, and that he had endorsed the bill to the plaintiff, if at all, solely that plaintiff might hold as trustee for Alexander. The counter-claim alleged that Alexander was indebted to the defendant in partnership accounts between them. The Master struck out the counter-claim, but Lindley, J., rescinded his order, saying, "they allege that Alexander is the real plaintiff."

Where it is the defendant who seeks to take advantage of his double character, the right to counter-claim may be more limited and less clearly defined. Thus, in *Norris v. Beazely* (q), the defendant was a shareholder in and was secretary of the Niger Merchants Co., and as such accepted

(n) 32 C. P. 162.

(o) *Pellias v. Neptune*, 5 C. P. D. 34; *Peat v. Jones*, W. N. 1881, 173; *Young v. Kitchen*, 3 Ex. D. 127.

(p) W. N. 1876, 23.

(q) 2 C. P. D. 80.

a draft for £500 drawn by the plaintiffs, shipbrokers, upon him. While the Company were in process of formation, and were not registered, the plaintiffs sold to them a vessel for which the £500 was the first instalment of the price. The bill of sale of the vessel was to the Company in its own name and not to the defendant. The defendant set up that he bought not for himself, but for the Company, and he counter-claimed for damages in respect of the fraudulent representation and concealment of the plaintiffs in reference to the quality and value of the ship, stating that he and the Company had incurred great expense with regard to the plaintiffs' misstatements in reference to the vessel. Upon an application under the Ord. XVI., rule 13, to add the Company as parties, Grove, J., refused the motion; and upon appeal, although it was argued that the defendant was only the nominal defendant, and that the Niger Merchants Co., the true defendants, if added, as they desired to be, might properly counter-claim for damages, this view was upheld. The case is more one of third party than of counter-claim, but the suggestion thrown out by Denman, J., may be noted that "the defendant might recover damages on his counter-claim as a trustee for the Company, and so complete justice would be done." The case held, however, that the mere fact that the third party sought to be added had a counter-claim, is no ground for making him a party; "The counter-claim allowed by the Judicature Act is the counter-claim of the defendant, not a claim by third parties."

But besides the counter-claim against the plaintiff alone, the Act contemplates a counter-claim against the plaintiff jointly with another person or persons, and even against a third person independently. With reference to this last extension of the right, it is to be noted that the English Judges declined to avail themselves of the full power given them by the 24th section of the Act of 1873, s.-s. 3, and provided no machinery in the rules of procedure for carrying out this section in relation to counter-claims against a third party alone, to which the plaintiff was not a party (r).

(r) *Trevelan v. Bray*, 1 Chy. D. 176; *Padwick v. Scott*, 2 Chy. D. 736; *Furness v. Booth*, 4 Chy. D. 586; *Central, etc., v. Grove*, 40 L. J. Rep. 540.

The reason given was that by so doing the plaintiff might be compelled to wait for his judgment until the defendant and the third party decided who was ultimately liable, in cases where the claim of the plaintiff against the defendant was clear. They were entirely justified in taking this course, as the question is one of practice merely as to which the legislature has always respected and deferred to the views of the Courts themselves, as upon a subject within the inherent jurisdiction of the latter. It is observable that the statute itself enacts principles, and leaves it to the Judges to frame the rules of pleading. This is consistent with the course adopted on a prior occasion when it was sought to reform the system of Common Law pleading. The Act 3 & 4 William IV. cap. 42, relegated to the Judges the task of making such reforms in matters of pleading as they thought expedient. The result was the Reg. Gen. of Hilary Term, 1834, which were laid before Parliament and not altered. The right is not by this omission denied; since it can be, as before, enforced in a separate proceeding. Questions of relief which a defendant may seek against a co-defendant alone are, indeed, not properly the subject of counter-claim. But the result can be attained in another way; and in order to decide finally all matters in dispute a practice appears to have sprung up in England of utilizing Order XVI., sec. 17, under which the Judge could make an order, where it appears evident the plaintiff cannot be delayed or prejudiced, to have these issues determined as between defendants, if they can be conveniently so tried (s). No difficulty has been experienced in any case in obtaining such order where the plaintiff's consent was secured (t). As these questions and issues are not, as before remarked, questions of counter-claim, they should be raised by a pleading which should not be called a counter-claim (u).

It must always be borne in mind, in these cases, that the plaintiff is not, without his consent, to be delayed by

(s) *Bower v. Hartley*, 1 Q. B. D. 652.

(t) *Bagot v. Easton*, 11 Chy. D. 392; and see *Warner v. Bright*, there cited.

(u) *McLay v. Sharp*, W. N. 1879, 216; *Butler v. Butler*, 49 L. J. Ch. 742.

the discussion of questions between defendants in which he is not concerned (*v*). Questions of contribution, indemnity, or of remedy or relief over against third persons, in which the plaintiff has no interest, or between plaintiff, defendant and such third person, or between either (*i. e.*, any two) of them, when arising incidentally in the course of the litigation, or suggested by the Court itself, are to be disposed of by order of the Court under Rule 107 (*w*). It may not be easy to determine, in the absence of decided cases, what questions may be held to come up properly for disposal under this rule, but they should be clearly distinguished from matters which are the proper subject of counter-claim (*x*). The Court of Chancery always possessed power to bring necessary parties before it (*y*).

Some of the earliest cases determined that the limits of the right to counter-claim must be strictly drawn where it is sought by the defendant to introduce new parties into the litigation. Thus, in *Quinn v. Hession* (*z*), the rule was firmly insisted upon that the counter-claim against the plaintiff and third party must relate to the subject-matter of the action. It must claim relief against the plaintiff and he must be made a party to it (*a*). It is readily seen why this is so, if it be remembered that the counter-claim is a cross-action which the statute permits to be tried at the same time as the original claim. A counter-claim which does not ask relief against the plaintiff, or one of the plaintiffs, cannot be a cross-action at all. Our own Courts have held that counter-claims must be sparingly allowed (*b*), and this caution is useful in view of the possible complexity of issues which may arise in an action under the present practice. The latitude given is abundant. The defendant is not limited to one counter-claim, and where two or more

(*v*) Rule 112; *Biscoe v. Ward*, 1 C. L. T. 129, decided before the Judicature Act.

(*w*) Sec. 16 O. J. Act, sub-s. 4, Rules 110-111.

(*x*) *Tildesley v. Harper*, 3 Chy. D. 277.

(*y*) G. O. 59.

(*z*) *Supra*.

(*a*) *Harris v. Gamble*, 6 Chy. D. 748.

(*b*) *Canadian Securities Co. v. Prentiss*, 10 P. R. 324.

plaintiffs make a joint claim, he may counter-claim separate claims against each sounding in damages (c); and he may counter-claim against the plaintiffs alone, or some or one of them alone, or against all or some or one of the plaintiffs jointly with some third person or persons (d). And the plaintiff may deliver a counter-claim to the defendant's counter-claim where the subject matter is the same (e). But the third party brought in by counter-claim, although he is a "defendant," cannot counter-claim as against the original defendant (f). He has the right, equally with the plaintiff, to move to exclude the counter-claim if he thinks that the issues raised by it should not be disposed of in the action (g); and if it contains alternative inconsistent claims for relief, in one of which he is not interested, he may demur (h).

These random notes may close with the notice of one further point.

In *Potter v. Chambers* (i), the plaintiff claimed £114 8s. and the defendant counter-claimed for £109 16s. The jury found both claim and counter-claim proved, and the Judge directed a verdict to be entered for the plaintiff for £4 12s., the balance due, which was done, and nothing was said at the trial as to costs. Subsequently, the defendant moved for the costs of his counter-claim, and contended that the issues should have been entered distributively, i.e., judgment for plaintiff on the claim for £114 8s. and judgment for defendant on the counter-claim for £109 16s. The motion was dismissed, and was re-argued before the Divisional Court, which upheld the order dismissing the motion upon several grounds, but among them, upon the ground that there should be but one judgment in the action, and

(c) *Manchester etc., v. Brooks*, L. R. 2 Ex. 243.

(d) *Dear v. Swoorder*, 4 Ch. D. 473; *Turner v. Hednesford Gas Co.*, 3 Ex. D. 145.

(e) *Toke v. Andrews*, 8 Q. B. D. 428.

(f) *Street v. Gover*, 2 Q. B. D. 498.

(g) Order xviii. Rules 5, 6 and 7.

(h) *Evans v. Buck*, 4 Chy. D. 432. But see O. J. Act, sec. 92; *Cox v. Barker*, 3 Chy. D. 359.

(i) 4 C. P. D. 69.

that should be for the party in whose favour the balance was found and for the amount of the balance. The earlier cases of *Staples v. Young* (j) and *Blake v. Appleyard* (k) were referred to as difficult to reconcile. In *Staples v. Young*, the facts were almost identical. The action was for the balance of purchase money due on the sale of a shop; the counter-claim was a small sum due for repairs which the plaintiff had contracted with defendant to make, and for damages for the plaintiff's misrepresentation as to the amount of business done. Here, however, the judgment was entered distributively—for the plaintiff £26, and for the defendant £28—but the Judge refused to make any order as to costs. Upon argument of the plaintiff's motion for costs, his counsel admitted that by analogy to the old practice if the counter-claim were a liquidated set-off, the judgment would have been for the balance only, but he urged that in the present case the set-off was unliquidated, and it was unjust to subject a plaintiff to the risk of losing his costs where it was impossible for him to foresee what damages a jury might assess upon the counter-claim. Barons Cleasby and Pollock held that the intention of the Act was to place set-off and counter-claim upon the same footing, and upheld the principle that there is but one judgment and that is for the balance, to be entered in favour of the party for whom the balance is found. In *Blake v. Appleyard*, the claim and counter-claim were both allowed, namely, £40 and £10 respectively. The Judge made no order as to costs. Upon taxation, the Master allowed the plaintiff his costs in the cause generally, and the defendant his costs of proving so much of his counter-claim as he succeeded in, and his costs of pleading so far as they related thereto. The plaintiff appealed from the taxing officer, and urged that the defendant should have no costs, as the judgment was in the plaintiff's favour, and in any case, considering the claim and counter-claim as separate actions, the amount of the counter-claim was below £20, the English County Courts Act allowing no costs in actions

(j) 2 Ex. D. 324.

(k) 3 Ex. D. 195.

under that amount unless by Judge's order. Mr. Justice Field allowed the appeal, but Kelly, C.B., and Pollock, B., in judgments which, as reported, are a little difficult to follow, concurred in overruling Mr. Justice Field's order.

The later rule, so far as established, as to costs would seem to emphasize the necessity of pleading what is properly a defence as such, and not as a counter-claim. Thus, if what is properly a set-off is pleaded as a defence and is found to be of equal or greater amount than the plaintiff's claim, the plaintiff fails and gets no costs, but pays them to the defendant (*l*). Whereas where both claim and counter-claim succeed, the plaintiff is entitled to his full costs of claim, and the defendant only to costs which are strictly those of the counter-claim, even if the balance is in favour of the defendant (*m*). These cases exhibit the conflict of opinion as to the nature of counter-claim which has been already noticed.

WM. SETON GORDON.

(*l*) *Stooke v. Taylor*, 5 Q. B. D. 576.

(*m*) *Re Brown*, 23 Chy. D. 377.

THE CANADIAN LAW TIMES.

OCCASIONAL NOTES.

Supreme Court of Canada.

ONTARIO.]

BADENACH v. SLATER

[JUNE, 1884.

Assignment for benefit of creditors—Power to sell on credit—Fraudulent preference.

In a deed of assignment for the benefit of creditors, the following clause was inserted :—" And it is hereby declared and agreed that the party of the third part, the assignee, shall, as soon as conveniently may be, collect and get in all outstanding credits, &c., and sell the said real and personal property hereby assigned, by auction or private contract, as a whole or in portions, for cash or on credit, and generally on such terms and in such manner as he shall deem best or suitable having regard to the object of these presents." No fraudulent intention of defeating or delaying creditors was shown.

Held, affirming the judgment of the Court below, 8 App. R. 402 ; 3 C.L.T. 156, that the fact of the deed authorizing a sale upon credit did not, *per se*, invalidate it, and the deed could not on that account be impeached as a fraudulent preference of creditors within the Act R. S. O. cap. 118, sec. 2.

Gibbons, for the appellant.

Foster, for the respondent.

CANADA SOUTHERN RAILWAY CO. v. PHELPS.

Railway Company—Negligence—Damages—Fire communicated from premises of the company.

This was an action by the respondent against the appellants, for negligence on the part of the appellants in causing the destruction of the respondent's house and outbuildings by fire from one of their locomotives. The freight

shed of the company was first ignited by sparks from one of the company's engines, and the fire extended to the respondent's premises.

The following questions *inter alia* were submitted to the jury, and the following answers given:—

Q. Was the fire occasioned by sparks from the locomotive? A. Yes.
 Q. If so, was it caused by any want of care on the part of the company or its servants, which under the circumstances ought to have been exercised? A. Yes.
 Q. If so, state in what respect you think greater care ought to have been exercised? A. As it was a special train, and running on Sunday when employees were not on duty, there should have been an extra hand on duty.
 Q. Was the smoke-stack furnished with as good apparatus for arresting sparks as was consistent with the efficient working of the engine? If you think the apparatus was defective, was it by reason of its not being of the best kind, or because it was out of order? A. Out of order.
 A verdict was rendered for the plaintiff, \$800.

Held, affirming the judgment of the Court below, that the questions were proper questions to be submitted to the jury, and that there was sufficient evidence of negligence on the part of the appellants' servants to sustain their finding.

If a railway company are guilty of default in the discharge of the duty of running their locomotives in a proper and reasonable manner, they are responsible for all damage which is the natural consequence of such default, whether such damage is occasioned by fire escaping from the engine coming directly in contact with and consuming the property of third persons, or is caused to the property of such third persons by fire communicating thereto from property of the railway company themselves, which had been ignited by fire escaping from the engine coming directly in contact therewith.

Hector Cameron, Q.C., and *Kingsmill*, for the appellants.

James Bethune, Q.C., for the respondent.

STAMMERS v. O'DONOHUE.

Specific performance—Contract—Vendor's name.

Held, affirming the judgment of the Court below, 8 App. R. 161, which affirmed the decree of the Court of Chancery, 28 Gr. 207; 1 C. L. T. 128, on the facts there stated, that although the vendor's name was not mentioned in the agreement signed by the auctioneer, the subsequent letters of the vendor and his admissions were sufficient to constitute a complete and perfect contract between the appellant as vendor and respondent as purchaser so as to satisfy the Statute of Frauds.

O'Donohue, Q.C., appellant in person.

Bain, Q.C., for the respondent.

NEILL v. THE TRAVELLERS' INS. CO.

Insurance Policy—Condition—Voluntary exposure to unnecessary danger.

The plaintiff (appellant) brought an action upon a policy of insurance effected by the respondents upon the life of her deceased husband J. N., who met his death during the currency of the policy, from being run over by a railway train upon one of the lines of the Northern Railway running through the company's station yard at Toronto. In answer to the plaintiff's claim the respondent set up, amongst other defences, a condition of the policy whereby no claim should be made thereunder when the death or injury might have happened "in consequence of voluntary exposure to unnecessary danger, hazard, or perilous adventure." The uncontradicted evidence was that the deceased was killed by the train while he was driving alone on a dark night in the company's yard amongst a network of railway tracks at Toronto, at a place where there was no roadway for carriages; but it was not shown why, or for what purpose he was there.

Held, affirming the judgment of the Court below, 7 App. R. 570; 2 C.L.T. 543, that the undisputed facts showed that the deceased came to his death "in consequence of voluntary exposure to unnecessary danger," and therefore respondents were entitled to a nonsuit.

Lash, Q.C., for the appellant.

C. Robinson, Q.C., and *McCarthy, Q.C.*, for the respondents.

MANITOBA.]

SINNOTT v. SCOBLE.

Permits to cut timber—Rights of holders—Dominion Lands Act, 1879, sec. 52.

On the 1st November, 1881, S. and others obtained a permit from the Crown Timber Agent, Manitoba, "to cut, take and have for their own use from that part of Range 10 E. that extends fifteen miles north and five miles south of the Canadian Pacific Railway track, the following quantities of timber, 2,000 cords of wood, 25,000 ties—Permit to expire on 1st May, 1882." A similar permit was granted to M. Sinnott & Co., dated 10th February, 1882, authorizing the cutting, removing &c., of 25,000 ties. In February, 1882, under lease granted by an Order in Council of 27th October, 1881, S. D. & T. cut timber for the purposes of the construction of the C. P. R. from the lands covered by the permit of 21st November, 1881; S. and others by their bill of complaint claimed to be entitled by their permit to the sole right of cutting timber on the lands until the 1st May, 1882, and prayed that the defendants S. D. & T. might be restrained by injunction from cutting timber on the lands, and might be ordered to account for the value of the timber cut. S. D. & T. justified their acts under the *Order in Council* of 27th October, 1881, and denied the exclusive possession of the lands of standing timber.

Held, as to the judgment of the Court below, that the holders of a permit to cut timber are not, during its currency, vested with any

enforcing power or rights to the possession of the lands or the standing timber, and that S. and others' permit amounted to no more than a permission or license to enter on the land and cut the quantity specified in the permit.

Hector Cameron, Q.C., and Kennedy, for the appellants.

McCarthy, Q.C., for the respondents.

ONTARIO.

Supreme Court of Judicature.

COURT OF APPEAL.

[JUNE, 1884.]

McEWAN v. McLEOD.

Practice—Interest on judgments.

Where an appeal is made against a judgment in any personal action which is affirmed on appeal, interest is allowed for such time as execution has been stayed by the appeal; but where the plaintiff refrained from entering up his judgment until after the decision in appeal, this Court refused to order interest to be allowed on the amount of the verdict, leaving the plaintiff to apply to the Court below for relief by entering the judgment *nunc pro tunc*.

Aylesworth, for the motion.

Holman, contra.

Boyd, C.]

PETRIE v. HUNTER.

GUEST v. HUNTER.

Mechanics' Lien—Default of contractor—Verbal contract with sub-contractor—Statute of Frauds.

The judgment of the Court below, 3 Ont. R. 233; 3 C. L. T. 33, was affirmed.

J. Reeve, for the appellant.

Black, for the respondent.

TRINITY COLLEGE v. HILL.

Foreclosure—Absent defendant—Decree nisi—Decree absolute by motion—Opening foreclosure.

A foreclosure suit was commenced in 1876, one of the defendants being out of the jurisdiction and the other being over ninety years of age and unfitted to transact business. The bill was personally served upon the latter, but the former was served by mailing.

The usual foreclosure decree for redemption or foreclosure was made, an account was taken thereunder and in default of redemption a final order of foreclosure was made, which on its face was subject to G. O. 114, 115 and 116. In March, 1882, the plaintiffs sold to G. In May, 1882, a petition was presented on behalf of the defendants for leave to redeem, alleging the ignorance of the absent defendant of any proceedings till his return to this Province a few days before the petition was presented, etc.

Held, reversing the order of Boyd, C., that the defendants should be allowed to redeem on paying principal, interest and costs, with the costs of G., the purchaser, of this petition and those incurred by him in his purchase, each party to pay his own costs of the appeal. In default of payment within three months the appeal to be dismissed with costs.

Bein, Q.C., for the appellants.

VanKoughnet, Q.C., and *Hoyles*, for the respondents.

GALT, J.]

McDONALD v. BULLIVANT.

Mortgage—Merger.

The defendant and B. had created a mortgage on certain lands which the defendant subsequently conveyed to one P., the conveyance being silent as to whether it was a sale of the equity of redemption merely or an absolute sale, the payment of the mortgage being part of the consideration. The defendant subsequently became insolvent, and included this in his schedule as an indirect liability, and the mortgagee obtained from P. an assignment of the mortgage to his wife in order, as he stated, to prevent a merger. In a proceeding by the mortgagee against the defendant, an award was made in favour of the plaintiff, which the defendant moved to set aside. His motion was refused, and on appeal to this Court the order was affirmed.

A. Hoskin, Q.C., for the appellant.

Cassels, Q.C., for the respondent.

PROUDFOOT, J.]

[30TH JUNE, 1884.

BEEMER v. OLIVER.

Insolvent Act of 1875—Sale by assignee—Creditor receiving dividend—Objecting to sale.

The judgment of the Court below, 3 Ont. R. 523; 3 C. L. T. 100, was affirmed.

Moss, Q.C., and *Fitch*, for the appellant.

Cassels, Q.C., for the respondent.

FERGUSON, J.]

GREEN v. WATSON.

Patent of invention—Sale of right to manufacture—Covenant to warrant and defend manufacture—Construction of—Infringement of patent—Breach of Covenant—Effect on right to receive royalty.

The Court being equally divided, the judgment of the Court below, 2 Ont. R. 627; 3 C. L. T. 103, was affirmed.

Robinson, Q.C., and *Bethune, Q.C.*, for the appellant.

Edward Blake, Q.C., and *Cassels, Q.C.*, for the respondent.

DUNLOP v. DUNLOP.

Conveyance obtained by undue influence—Action thereon—Cancellation of.

Action to restrain waste. It was shown that the plaintiff obtained from his father a deed of the premises in question, the father swearing that he supposed when executing the document that it was his will he was making, and the conveyancer who prepared the deed admitting in his evidence that he might have suggested to the subscribing witness to the deed not to talk too much to the old man about the writing, as perhaps he would not sign it; the deed, as prepared, was silent altogether as to certain provisions and payments that were to be made, as alleged by the plaintiff. The Court reversed the judgment of the Court below, ordered the action to be dismissed with costs, and the deed to be delivered up to be cancelled.

G. T. Blackstock, for the appeal.

Edwards, contra.

BURTON, J. A.]

In re ALGOMA ELECTION.

Provincial controverted election—Corrupt charges against persons not parties—Striking out—Purging record on motion of Court.

The petition contained charges of gross corruption against the members of the Ontario Cabinet who were not parties to the petition, but the charges

were such that, without the allegations in the petition which were complained of, evidence might be given respecting them at the trial.

Held, affirming the order of Burton, J. A., that the allegations respecting these charges should be struck out.

On the appeal, it appeared that another paragraph of the petition contained a charge against the returning officer of having purposely placed one of the polling places in an inconvenient locality, so that many voters were prevented from voting, and it alleged that the returning officer did not act impartially, "but, on the contrary, had lent himself to and became and was the pliant and subservient tool of the said" members of the Ontario Cabinet, "or some or one of them, and improperly acted under their directions and instructions, with a view to and for the purpose of aiding in the election of," etc.

The Court, of its own motion, struck out the paragraph, and ordered the appellant to pay the costs of the motion.

McCarthy, Q.C., for the appellant.

Bethune, Q.C., and *Wm. Jackson*, for the respondent.

C. C. GREY.]

HARRIS v. MOORE.

Oral evidence to explain agreement—New trial—Discretion of Judge.

The plaintiff agreed to sell to the defendant a water-wheel "and place the same in position" for \$150, but the defendant refused payment upon the ground that the wheel had not been properly placed, and did not in fact perform the work stipulated for. The jury rendered a verdict in favour of the defendant, which the Judge of the County Court set aside, and directed a new trial, costs to abide the event. On appeal, this Court refused to interfere with the discretion of the Judge below, considering that the term "placed in position" was so indefinite that the defendant was at liberty to show what was meant thereby; the writing by such parol evidence not being added to or varied, but only rendered intelligible. Under these circumstances the Court refused to make any order as to the costs of the appeal.

Falconbridge, for the appellant.

Creswell, Q.C., for the respondent.

C. C. HALTON.]

McKINDSEY v. ARMSTRONG.

Trust for sale and to pay beneficiary—Attachment of proceeds.

E. A. conveyed lands and chattels to one B. upon trust to convert the same into money, to pay debts, etc., and as to any balance remaining upon trust to pay the same to R. A., son of E. A., or, if the party of the second

part (B.) should see fit, he might invest the same in the purchase of a homestead and convey the same to R. A., his heirs, etc.

Held, reversing the judgment of the Court below, that there was not any debt due from B. to R. A. that could be garnished by the creditors of R. A.

Aylesworth, for the appellant.

Beaty, Q.C., for the respondents.

C. C. MIDDLESEX.]

GARNER v. HAYES.

Building contract—Order for price of lumber accepted—Failure of contractor—Liability on acceptance.

One M. agreed with the defendant for the erection of a dwelling house for the defendant, in two months from date, and if M. neglected to build the house the defendant was to be at liberty to purchase material and employ workmen to finish it, and deduct the cost of material, etc., out of the contract price. The plaintiff agreed to supply M. with lumber to be used in the building, and M., after a portion of the lumber had been placed in the building, gave the plaintiff an order on the defendant for \$341.46 "for lumber used in your house, one month after the building is completed," which the defendant accepted. M. failed to complete the building, and the defendant did so in accordance with the terms of the agreement.

Held, affirming the judgment of the Court below, that, to the extent of the balance of the agreed price for the building remaining in the defendant's hands, he was liable to pay the plaintiff, notwithstanding that M. did not complete the building, the terms of the order including lumber which had previously been used in the building as well as that subsequently placed therein.

Macbeth, for the appellant.

R. M. Meredith, for the respondents.

C. C. PERTH.]

FARROW v. TOBIN.

Execution—Wrongful seizure by bailiff—Interpleader—Action for damage.

The defendant, as bailiff of a Division Court, seized two horses, a wagon, etc., of the plaintiff under an execution against another person, which, in an interpleader issue, were decided to be the goods of the plaintiff, and at the end of three weeks the plaintiff obtained possession of them from the bailiff. In an action brought by the plaintiff against the defendant for damage done to the horses during the time they were in his possession, the jury, under the direction of the Judge, found a verdict for the plaintiff, and assessed the damage at \$80, which verdict the Judge subsequently refused to set aside.

Held, affirming the judgment of the County Court, that the finding of the Judge on the interpleader proceedings formed no grounds of defence to the action for damages for the alleged injury to the property.

Woods, for the appellant.

Smith Q.C., for the respondent.

WEINHOLD v. KLEIN.

Lease of lands—Deduction of rent—Charge to jury as to admissions of defendant.

The plaintiff leased to the defendant a field for the purpose of growing flax, at an agreed rental of \$10 an acre. In answer to the claim for rent the defendant attempted to show that he had sustained damage by reason of the ground being full of thistles, and that an allowance was to be made on that account.

Held, affirming the judgment of the Court below, that the jury were properly told for their guidance in adjusting such allowance, how the defendant had himself settled with other persons who had thistles in their flax fields.

Woods, for the appellant.

Osler, Q.C., for the respondent.

C. C. WATERLOO.]

MCLEAN v. BREITHAUPT.

Stoppage in transitu—Intervening process.

The plaintiff sold W. G. a quantity of leather which was to be sent by the plaintiff to the purchaser by railway. The shipping bill contained, amongst others, the following conditions:—"In all cases . . . the delivery of goods will be considered complete, and the responsibilities of the company shall terminate, when the goods are placed in the company's shed or warehouse . . . when they shall have arrived at the place to be reached upon the railway of this company. The warehousing of them will be at the owner's risk," who was to be liable for any charges for storing them otherwise than in the warehouse of the company. "Storage will be charged on all freight remaining in the depots over 48 hours after its arrival." While the leather remained in the warehouse of the Railway Co. the purchaser requested that it might be stored by the company's servants, he agreeing to pay, but not paying, the charge for freight thereon, and subsequently the sheriff paid the charges thereon, seized the leather and removed it from the premises of the Railway Co. under a writ of attachment sued out by the defendants against W. G., as an absconding debtor.

Held, affirming the judgment of the Court below, 3 C. L. T. 314, that this did not deprive the vendor of his right to stop the goods in transitu.

Robinson, Q.C., for the appellant,

J. K. Kerr, Q.C., and *A. C. Galt*, for the respondent.

C. C. YORK.]

GODDARD v. COULSON.

Mechanic's Lien—Sub-contractor—Ten per cent. reservation.

The defendants contracted with one C. for the execution of the stone work upon certain buildings. In fact C. never did complete the work, but during the progress thereof he was paid in good faith sums exceeding the value of the work actually done by him on the building before he abandoned the contract.

Held, reversing the judgment of the Court below, that a sub-contractor with C. could not enforce payment of his claim out of the ten per cent. reserved under the Act 41 Vict. cap. 17. sec. 11, as security for the payment of the claims of sub-contractors.

C. Ritchie, for the appellant.

Snelling, for the respondent.

PALIN v. REID.

Innkeeper—Gratuitous bailee.

The plaintiff had been for sometime a guest of the defendant, an innkeeper, and on leaving the inn, after paying his bill, left a box containing some papers and books alleged to be of value to the plaintiff, in the room of the inn used for storing luggage, etc., the plaintiff intending to take it away the day following, but, owing to the illness of the plaintiff he did not call for it for several weeks afterwards, when it was discovered that the box was lost. The plaintiff was not to pay anything by way of storage, etc., and it was shown that the defendant had not been guilty of any negligence in the matter. In an action brought to recover the value of the box and contents at the trial before Z. Burnham, Esquire, Judge of the County Court of Ontario, sitting for the Judge of the County of York, a verdict was entered for the defendant, which in the following term was set aside, and a verdict entered for the plaintiff for \$50. On appeal, this judgment was reversed, and the rule to set aside the verdict was discharged.

Osler, Q.C., and *O'Sullivan*, for the appellant.

Delamere, for the respondent.

SURROGATE COURT, MIDDLESEX,]

REGAN v. WATERS.

Will—Probate—Testamentary capacity—Evidence of unscientific witnesses.

On the trial of an issue before a jury as to the capacity of a testator, evidence was given as to his mental capacity by persons who had been well acquainted and had had frequent intercourse with him, but were unskilled persons. The learned Judge at the trial was of opinion that the witnesses were not of a class qualified to give scientific evidence, and withdrew the case from the jury, and subsequently refused to set aside his judgment.

Held, that there should be a new trial, for that the opinions of the witnesses should have gone to the jury, who might judge of their value according to their experience or aptitude for forming their opinions.

McCarthy, Q.C., for the appellant.

R. M. Meredith, for the respondent.

IN CHAMBERS.

MAGURN v. MAGURN.

[OSLER, J. A.]

Alimony—Counsel fees—Practice.

A judgment having been obtained for alimony, the defendant appealed to the Court of Appeal.

Held, that the plaintiff was entitled to an order directing the husband to pay a sufficient sum to cover her fee to counsel.

Quære, whether, if the practice of ordering the husband to pay the wife's disbursements in alimony actions were reconsidered, the altered status of married women under recent legislation would not supersede it.

Langton, for the motion.

C. Millar, contra.

High Court of Justice.

QUEEN'S BENCH DIVISION.

[WILSON, C.J., AND OSLER, J.A., 27TH JUNE, 1884.]

SRIGLEY v. TAYLOR.

Election—Disqualification for voting—Agent for the sale of Crown lands.

By Order in Council the defendant was appointed agent for the location and sale of lands, under the Free Grant and Homesteads Act, R. S. O.

cap. 24. By letter from the Crown Lands Department the defendant was instructed to enter upon his duties respecting the location of free grants, but not to sell lands or receive money until he had given the usual security. By R. S. O. cap. 10, sec. 4, all "agents for the sale of Crown lands," amongst other persons, are disqualified from voting at elections for the Legislature under a penalty. The defendant, before he had given the necessary security, voted at an election for the Legislature.

Held, that he was an agent for the sale of Crown lands within the meaning of the Act, and therefore liable to the penalty imposed.

The question whether or not the defendant was such an agent, is a question of law and not a question for the jury.

Arnoldi, for the plaintiff.

Osler, Q.C., for the defendant.

GILBERT v. GODSON.

Agreement to excavate gravel—Reservation of land adjacent to fences—Right to lateral support for reserved land.

The plaintiff agreed with the defendants that they should dig gravel from the plaintiff's pits, and the agreement contained the following clause:—"I also reserve eight feet from line fences to protect them."

Held, that the plaintiff was not entitled to lateral support for the eight feet so reserved, and therefore the defendants were not liable for damage caused by excavating up to but not beyond the eight feet limit.

Tilt, Q.C., for the plaintiff.

J. K. Kerr, Q.C., and *Neville*, for the defendants.

PORTEOUS v. MYERS.

Gratuitous bailment—Negligence—Liability of bailee.

The plaintiff left a sum of money with the defendant, a shopkeeper, for safe keeping. The money was put in a safe in the defendant's shop, but when the plaintiff applied for it the next day the defendant told her that it had been taken and he could not give it to her. On the evidence, the jury found, in answer to questions submitted to them, that the defendant was wanting in ordinary care and diligence in taking care of the money, in unlocking the drawer in which it had been placed, and leaving it unlocked while he went to the cellar to get goods for customers who were thus left alone in the shop, and that the money was lost through the defendant's negligence. They also found that the defendant wrongfully appropriated the money. Judgment was directed to be entered upon these answers for the plaintiff, and the Court refused to disturb the judgment.

Idington, Q.C., for the plaintiff.

Smith, Q.C., for the defendant.

CARRIGAN v. THE GRAND TRUNK RAILWAY CO.

Negligence—Railway—Bell—Sufficiency of bell—Speed of train in cities, etc.—Fencing track on highway—Contributory negligence.

By the Consolidated Railway Act, 1879 (D) every locomotive engine shall be furnished with a bell of at least 30 lbs. weight which shall be rung at the distance of at least 80 rods from every crossing over a highway, and be kept ringing until the engine has crossed the highway. The learned Judge charged the jury that the object was that a person passing at the crossing should receive warning of the approach of the train, and the bell must be such a bell as would reasonably give that warning.

Held, a proper direction.

By the same Act no locomotive shall pass through any thickly peopled part of any city, etc., at a speed greater than six miles an hour unless the track is properly fenced.

Held, that this applies as well to the crossing of a highway as to other parts of a city, etc., and that the defendants were guilty of a breach of the Act in running a train at a greater speed than six miles an hour across a highway in a village where the only portion of the track not properly fenced was that portion which crossed the highway.

The plaintiff was well acquainted with the locality in question and had known it for many years as a dangerous crossing, but when approaching it in his waggon did not look along the track to see if a train was coming, though he could have seen the train in question in time to have stopped his horses before reaching the track. He did not see a train which was approaching until he was on the track, and it was too late to avoid being struck. The jury found for the plaintiff.

Held, that there was evidence of contributory negligence, and a new trial was directed.

Guthrie, Q.C., for the plaintiff.

Osler, Q.C., for the defendants.

KELSO v. BICKFORD.

Railway company—Claim by president for services—Resolution of directors—Contract with company—Consolidated Railway Act—Novation.

The plaintiff claimed a sum for services as president of the G. J. R. Co. under a resolution of the directors, and alleged that the defendants had assumed the liabilities of the company.

Held, that the directors had no power to adopt such a resolution, it being a contract by the plaintiff directly for his own benefit with the company, and contrary to section 19, sub-section 16, of the Consolidated Railway Act, 1879.

Held, also, that, not being a valid claim against the company, it could not be made a claim against the defendants by novation.

Dickson, Q.C., for the plaintiff.

Osler, Q.C., and *Deslambere*, for the defendants.

COMMON PLEAS DIVISION.

COMMERCIAL NATIONAL BANK OF CHICAGO v. CORCORAN.

Foreign Corporation—Right to hold goods—Transfer of warehouse receipts—Bills of sale Act—Banking Act.

C. & Co., carrying on business in Chicago, in the State of Illinois, for the manufacture of mill machinery, had certain machinery manufactured for them in Stratford, Ont., by the T. & W. Manufacturing Company, which was warehoused with M. & T. at Woodstock, Ont. C. & Co., being pressed by the plaintiffs, their bankers in Chicago, for collateral security for two of their notes of \$5,000 each, discounted by the bank, endorsed to the bank the warehouse receipts for these goods. At the maturity of the notes, C. & Co., not being in a position to retire them, in pursuance of an arrangement made to that effect, the warehouse receipts were cancelled, and new ones, dated 12th October, 1883, were made out direct to the plaintiffs. On 3rd September, 1883, C. & Co. had made an assignment to a trustee for the benefit of their creditors. On 22nd November, the defendants placed a writ of execution in the sheriff's hands against C. & Co., under which these goods were seized. It was found that there was no fraudulent preference or intent. In an interpleader issue,

Held, that the plaintiffs, a foreign corporation, could hold personal property in Ontario; that C. & Co. being resident in the State of Illinois, the transfer of the property must be governed by the law of that State, according to which it was valid, subject to whatever rights the trustee for creditors had; that the effect of the warehouse receipts to the plaintiffs was to transfer the property and possession in the goods to the plaintiffs subject to the trustee's rights, and therefore there being a change of possession, the Bills of Sale and Chattel Mortgage Act did not apply.

Held, also, that the Banking Act did not apply.

The goods were held, therefore, to be the plaintiffs' as against the defendants.

J. K. Kerr, Q.C., and *Bird* for the plaintiffs.

Idington, Q.C., for the defendants.

LAW v. CORPORATION OF NIAGARA FALLS.

Municipal Corporation—Drainage—Liability for overflow.

Many years before defendants' municipality was laid out, a culvert was constructed by one Z. for a railway company on their lands which adjoined the stream in question. By reason of the culvert, the water brought down by the stream was not carried off, but overflowed the plaintiff's land. The stream was the natural drain for the surrounding country, but the defendants used it to a small extent for the drainage of the town. It was found that the flooding would not have been occasioned

by the water brought down through the defendants' user of the stream, but that the water brought down from the area drained, apart from the defendants' user, would have alone caused the damage.

Held, that the defendants were not liable for the damage sustained.

J. K. Kerr, Q.C., for the plaintiff.

Osler, Q.C., for the defendants.

McKAY v. CUMMINGS.

Malicious arrest—General issue by statute—Necessity of pleading—Evidence.

In an action for malicious arrest, it appeared that the plaintiff, a guest at an hotel in St. Catharines, on awakening in the morning at about six o'clock, discovered that he had been robbed of his gold watch and chain, and about \$50 in money. He sent for the Chief of Police, the defendant, and on his arrival met him on the street, outside the hotel, informed him of his loss and requested him to search the house, which the defendant refused to do, without a search warrant. An altercation then took place which ended in defendant calling plaintiff an impostor and arresting him and taking him to the police station, where, after being detained for a few minutes, he was discharged. The defendant attempted to justify his action by stating that he arrested the plaintiff for breach of one of the city by-laws in swearing in the street, but the evidence failed to establish that this was the case. The jury found a general verdict for the plaintiff with \$200 damages. They also specially found, in answer to a question put to them, "That the defendant honestly believed that his duty as constable called upon him to make the arrest." The learned Judge thereupon entered a non-suit, holding that the defendant should have received notice of action. The general issue by statute, R. S. O. cap. 73, was not pleaded, and the statement of defence was not framed so as to enable the defendant to avail himself of it; and there was no evidence on which the special finding of the jury could be supported.

Under these circumstances, the non-suit was set aside, and judgment entered for the plaintiff with the \$200 damages assessed.

Osler, Q.C., for the plaintiff.

J. K. Kerr, Q.C., for the defendant.

CAIN v. JUNKIN.

Crown grant—Description—Error—Evidence—Possession.

In 1851, J. purchased the whole of lot 20 from the Crown, the lot nominally containing 200 acres, and described in the Crown Lands Department books as containing 175 acres, more or less. On 30th October, 1852, before taking out his patent, J. sold and assigned, by a written assignment to R., the east half or part of the lot, described as

"seventy-five acres, whether more or less." In 1863, R. sold to B. his interest in the parcel described as containing seventy-five acres more or less, and as being composed of the east part of the lot. On 22nd July, 1863, B. took out a patent for his portion, the land being described as "seventy-five acres, more or less, being all the lot except the west 100 acres." On 28th August, 1868, J., who retained all he had not sold to R., took out a patent himself, the land being described as "the west 100 acres," without the words "more or less," these words having been erased from the printed form on which the patent was written. Subsequently B. re-conveyed to R. through whom the plaintiff claimed by *mesne* conveyances; the plaintiff claiming as one of the heirs of his father and as having acquired the title of the other heirs. J. after obtaining his patent, conveyed the northerly and southerly portions respectively of the 100 acres to his two sons, James and William, respectively. About the time J. took out his patent, by instructions from the plaintiff's father, a surveyor ran a line dividing the seventy-five acres from the 100 acres, and in 1874, procured another line out to be run under instructions to lay out the seventy-five acres, and the plaintiff's father and defendant jointly erected a fence on such line. The actual acreage, it appeared, exceeded 175 acres by some eleven acres, the surplus coming within the portion patented to B. The actual occupation under B.'s patent was confined to the seventy-five acres.

Held, that under the circumstances it could not be regarded that the patent to B. was issued in error so as to enable the defendant to claim the surplus of eleven acres.

Held, also, that the defendant failed to show any possessory title to such surplus except as to a small portion thereof.

Poussette, for the plaintiff.

Hudspeth, Q.C., and *G. H. Watson*, for the defendant.

WHEELER v. WILSON.

Company—Stock, cancellation of—Fraud—Laches.

The defendant was an original shareholder in a joint stock company, and, as such holder, was elected a director. Before being so elected a statement, prepared by the company's secretary, was published by them setting forth that the company was in a flourishing condition and earning a ten per cent. dividend. On the faith of such statement the defendant subscribed for new shares in the company. Soon afterwards the defendant suspected that the statement was incorrect and threatened legal proceedings to compel the company to cancel the stock, whereupon a resolution was passed directing the books to be examined, and on such examination the statement was found to be false and misleading, and the company practically insolvent. A meeting of the shareholders was then called and a by-law passed cancelling the stock. After the defendant's subscription for the new stock, and before the cancellation, as also before

the defendant became aware of the falsity of the statement, the plaintiff became a creditor of the company. The plaintiff obtained a judgment against the company and sued the defendant for the amount of the new stock unpaid by him.

Held, that the plaintiff could not recover; that there was power to cancel the stock; that the cancellation was duly made, and that the defendant was not guilty of any laches.

Allan Cassels, for the plaintiff.

J. K. Kerr, Q.C., for the defendant.

LANDREVILLE v. GOUIN.

Negligence—Snow and ice falling from roof of houses—Liability—Notice of state of roof.

In an action for damages sustained by the plaintiff by reason of snow and ice falling from the roof of the defendant's house and injuring him while he was walking on the highway, it appeared that about a half hour before the accident happened, the defendant was notified of the dangerous character of the roof, but took no precautions to prevent an accident.

Held, Rose, J., dissenting, that the defendant was liable.

Hector Cameron, Q.C., and *Frank Macdougall*, for the plaintiff.

McCarthy, Q.C., for the defendant.

TUCKETT v. EATON.

Seizure after payment of debt—Malice—Excessive damages.

After the amount of a judgment recovered in a Division Court had been paid, the plaintiff's goods were seized by the Division Court bailiff under an execution issued thereon. In an action for such seizure, the jury found for the plaintiff with \$1,500 damages.

Held, under the circumstances set out in the case, that the damages were clearly excessive.

Held, also, that the action would not lie without proof of malice, and that no malice was shown.

Osler, Q.C., for the plaintiff.

Shepley, for the defendant.

RICHARDSON v. JUNKIN.

Trespass—Title to land—Pleading—Rules 128, 148—Inferior Court costs—Setting off costs.

By rule 148, every material averment alleged in the former pleading is not to be taken as expressly denied, if not expressly admitted by the pleading of the opposite party, but the silence as to any allegation—which, read

with rule 128, means every material allegation—is not to be construed into an implied admission. Where, therefore, silence is not maintained, but an answer given which is insensible if it is not to be read as admitting certain statements in the former pleading, such statements must be taken as admitted.

A statement of claim alleged that the defendant entered into possession of the plaintiff's premises under a verbal lease for a year, and that he left before the expiration of his term, and wrongfully removed and took away and converted to his own use certain fixtures which had been put in by the defendant under an agreement with the plaintiff, whereby plaintiff remitted three months' rent; and alleging, by such removal and conversion, injury to the premises and loss to the plaintiff. The statement of defence alleged that, in order to render said premises fit for the purpose required, namely, a shop, it was necessary to refit the premises by putting in the fixtures in question, it being agreed that on defendant's leaving he should be allowed to remove said fixtures. At the trial, the jury found for the plaintiff with \$50 damages, and the learned Judge refused to certify to entitle the plaintiff to full costs. The taxing officer ruled that, without a certificate, the plaintiff was only entitled to tax Division Court costs, with the right to the defendant to set off full costs, and he taxed the costs accordingly. The plaintiff appealed to Galt, J., in Chambers, who affirmed the taxing officer's ruling.

Held, on appeal to the Divisional Court, affirming the order of Galt, J., that the effect of the statement of defence was to admit the agreement and the entry thereunder, and the only question in issue was the right to remove the fixtures, and therefore the title to land did not come in question, and the plaintiff, without a certificate, was not entitled to tax full costs.

It was urged that because the defendant failed in his defence he was not entitled to costs of and subsequent to his statement of defence.

Held, that this might have been urged before the Judge at the trial for the exercise of his discretion, but was not a ground of appeal.

George Bell, for the plaintiff.

Aylesworth, for the defendant.

SUTHERLAND v. COX.

Broker—Agreement to carry stock on margin—Failure to purchase stock—Right to recover margin—Usage and custom.

The defendants assumed a contract made by the plaintiff with one F., a broker, under which F. was to carry 500 shares of Federal Bank stock on margin for the plaintiff for a definite time. The defendants received from F. \$3,440 margin paid to him by the plaintiff, but it appeared that the defendants never had, and did not carry, any stock for the plaintiff, but were, as it is termed, "short" on this particular stock.

Held, that the plaintiff was entitled to recover from the defendants the amount so paid over to them as margin.

The custom of brokers commented on.

D. E. Thompson and *D. Henderson*, for the plaintiff.

J. K. Kerr, Q.C., and *Lash, Q.C.*, for the defendants.

McKERSEE v. McLEAN.

Seduction—Service—Right to maintain action.

In an action of seduction it appeared that the girl seduced was the grand-niece of the plaintiff. On her father and mother's death, which occurred when she was about twelve years old, she went to live with the plaintiff, and from thence went out to service to various persons, and at the time of the seduction and for three years previously, was in service with one C. retaining the wages she earned for her own use. While in C.'s service, she was seduced by the defendant in the month of April, she being at that time about 19 years old. In June following she went to Detroit for a couple of weeks, and from there to the plaintiff's, where she resided till she became ill, when she went to a hospital and was there confined. While at the plaintiff's she worked and did whatever was required of her, and the plaintiff treated her as if she was at home with him as her guardian.

Held, that the plaintiff could not recover; for that the right of action for the alleged wrong was not vested in the plaintiff, but in the person who was master of the girl at the time of her seduction.

Ashton Fletcher, for the plaintiff.

J. K. Kerr, Q.C., for the defendant.

REGINA *ex rel.* STEWART v. STANDISH.

Public school trustee—Contract—Disqualification—Costs.

Where a school trustee, who was a medical practitioner, acted in his professional capacity under an engagement by the board in examining the pupils attending the school as to the prevalence of infectious disease, and made a charge of \$15 therefor, which the board ordered to be paid.

Held, that this disqualified him as such trustee and rendered his seat vacant.

A rule for leave to exhibit an information in the nature of a *quo warranto* to test the defendant's right to retain his seat was directed to be made absolute without costs, unless within ten days the defendant admitted he had forfeited his seat, and consented to the board declaring it vacant, in which case the rule was to be discharged without costs.

Alister M. Clark, for the applicant.

Caswell, for the respondent.

HEPBURN v. PARK.

Chattel mortgage—Preference—Consideration, statement of.

In the case of a mortgage of goods, in order to create a fraudulent preference, not only must there exist a fraudulent intent in the mind of the mortgagor, but also in that of the mortgagee.

Part of the consideration of the mortgage was covered by a note, which was discounted by the mortgagee at a bank, the mortgagee being a merchant and having received the note in course of business from his customer.

Held, that from the mere fact of the note being discounted at the bank the Court could not assume that the debt represented by the note must be deemed to be paid, and the remedy on the note to be alone looked to, and therefore the amount of the indebtedness on the mortgage could not be said to be untruly stated.

Mackelcan, Q.C., for the plaintiff.

W. F. Walker, for the defendant.

WALTON v. SIMPSON.

Contract—Fraud—Waiver—New discovery of fraud.

A contract induced by fraud is not void, but voidable merely at the option of the party affected or prejudiced thereby, and when the party affected adopts the contract induced by fraud, the discovery of a new incident of the fraud does not revive the right to repudiate. In this case there being no finding by the jury that the defendant had knowledge of and had waived the fraud, a new trial was directed.

Bethune, Q.C., for the plaintiff.

Akers, for the defendant.

McCLURE v. KREUZEGER.

Sale of goods—Acceptance—Quantum meruit.

The defendant purchased from the plaintiff a carload of "No. 1 green hoops," to be delivered at the railway station. On the arrival at the station they were removed by the defendant to his own place, and some of the hoops used by him. He then wrote to the plaintiff that he was astonished at his sending dry and rotten hoops for first-class green hoops, and if he (defendant) had seen them before they were at his place he would not have touched them; that there were only 7,300 in the car instead of 7,640 as stated by plaintiff; that he enclosed a bill which was the amount he intended to pay and not a cent more, because they were not worth that; and if the plaintiff would accept the amount offered to let the defendant know by return of mail and he would remit. In answer to this the plaintiff, through a solicitor, threatened a suit, when the defendant replied that if plaintiff would not accept this he might go on and sue.

Held, that there was evidence to go to the jury of an acceptance of the hoops and agreement to pay on a *quantum meruit*.

Bethune, Q.C., for the plaintiff.

E. P. Clement, for the defendant.

MOFFATT v. SCRATCH.

Crown grant—Surrender, evidence of.

Certain land was granted by the Crown to one W., but subsequently, in consequence of an alleged surrender of the land to the Crown, a new grant was made to the defendant's vendor. After the issue of W.'s patent, and before the alleged surrender, the land was sold for taxes. The only evidence of the alleged surrender was an endorsement on the back of the new patent which stated that the land was surrendered by one M., "the attorney mentioned in the annexed power," but no power of attorney was produced, and the surrender was signed by M. as principal, and not as attorney for any named principal.

Held, in an action to recover the land, that under the circumstances the plaintiff claiming under the tax sale was entitled to recover the land as against the defendant claiming under the second patent.

J. H. Ferguson, for the plaintiff.

T. M. Morton, for the defendant.

[OSLER, J.A.]

CAMERON v. CANADA FIRE & MARINE INS. CO.

Insurance—Proofs of loss—Delivered as soon as possible after fire—Actual cash value of property—Property outside of Ontario—R. S. O. cap. 162.

The Fire Insurance Policy Act, R. S. O. cap. 162, does not apply to property outside of Ontario.

This was an action on a policy of insurance against fire. By one of the conditions of the policy it was provided that the proofs of loss should be delivered as soon after the fire as possible. The fire occurred on the 17th September, 1881, and the proofs of loss were not delivered until the middle of May, 1882, when they were objected to and returned to the insured, who re-delivered them in the same condition in the month of July following. The only reason given for not delivering them sooner was that it was not convenient to do so.

Held, that the condition was not complied with. Another condition required that the proofs of the loss or damage were to be estimated according to the actual value of the property, *i.e.*, what it could actually have been sold for in cash at the time of loss, and that the affidavit should state the actual cash value of the property. In the printed form of proofs of loss which was used, the words "actual cash value" were struck out and a statement substituted giving the cost of replacing the whole property destroyed and the cost of the property in 1880, a year previous to the insurance being effected.

Held, that this was not a compliance with the conditions, and under these circumstances there could be no recovery on the policy.

[ROSE, J., 29TH JUNE, 1884.]

THE FEDERAL BANK v. HOPE.

Motion for immediate judgment—Promissory note—Agreement to renew.

On the making of a promissory note it was agreed that the note should be renewed on payment of a named sum "if the renewal notes are continued in the same form or names as at present." After the making of the note the maker died. In an action on the note the defendant set up such agreement, and alleged that he duly offered to perform the agreement so far as lay within his power, by leaving the note and liability of the maker as they were, and giving his own note in renewal as agreed, as collateral to the said note, which tender the plaintiffs refused to accept, and which the defendant was at all times ready and willing to carry out.

A motion for an order for immediate judgment under rule 324 was dismissed, the Judge refusing to decide as to the legality of the defence on such motion.

Cattanach, for the plaintiffs.

W. Nesbitt, for the defendant.

LUNNEY v. ESSERY.

Reference—Official referee—Practice—Special findings, objections to—Judicature Act, sec. 47.

At the trial of an action a compulsory order of reference was made referring "all questions arising upon the pleadings in this action between the parties, including all questions of account (if any)" to an official referee, "for enquiry and report."

Held, that this was a reference under sec. 47 of the Judicature Act.

Under section 47 the reference is not to be a final one, but for enquiry and report for the assistance of the Court. The referee, therefore, has no power to give a general finding, but must specially find facts, and all the questions referred.

In this case, the referee having made merely a general finding for the plaintiff, the report was referred back to him to give the specific findings.

Held, also, that objections to the special findings in a report must be raised by notice of motion.

Watson, for the plaintiff.

Shapley, for the defendant.

DURNIN v. McLEAN.

County Courts—Amount liquidated by act of parties—Costs.

Action for \$228.20, being for a balance of a claim of \$1,828.20, the price of 8,310 lbs. of butter at 22c. per lb., less \$1,600 paid on account. At the

trial a verdict was rendered for the plaintiff for the balance claimed ; but the Court refused to certify for costs.

Held, that the amount was liquidated by the act of the parties within the meaning of sec. 19, s.-s. 2 of R. S. O. cap. 43, the County Courts Act, and therefore the plaintiff without certificate was only entitled to County Court costs.

A motion to a Judge for an order directing the defendant to pay to the plaintiff full costs without deduction or set-off was dismissed with costs.

Osler, Q.C., for the plaintiff.

Aylesworth, for the defendant.

QUILINAN v. CANADA SOUTHERN RAILWAY CO.

*Negligence in constructing Railway—Allegation that work negligently done
—Demurrer—Particulars—Mandamus—Compensation.*

The plaintiffs by their statement of claim claimed damages from the defendants for " unlawfully, negligently and wrongfully " depressing certain streets in the town of Niagara Falls, and thereby making it inconvenient and almost impossible for persons to approach the plaintiffs' store for business ; also, for negligently, unlawfully and wrongfully blocking up and rendering almost impassible the same streets in the neighbourhood of the plaintiffs' store, and thereby " negligently, unlawfully and wrongfully preventing customers or other persons coming to the plaintiffs' store, and almost entirely destroying the plaintiffs' business." The statement of claim further claimed, if the depressing or blocking up should be found to be lawful, that a mandamus should be granted requiring the defendants to proceed to arbitrate to ascertain the compensation payable to the plaintiffs ; or that it be referred to the proper officer to ascertain and state such compensation.

Held, on demurrer, that the statement of claim was sufficient ; that it was alleged that the work was negligently done, and this gave a cause of action even though the work itself were lawful ; and that if better particulars were required of the acts complained of, this should be by motion.

Quare, whether a mandamus would be granted ; for, if entitled to compensation, the proper remedy would apparently be by reference to the proper officer as asked by way of alternative relief ; also, whether it was necessary to allege that the defendant's railway touched or took a portion of the plaintiff's land ; and also, whether, under the Railway Act, the defendants were only liable to make compensation for lands taken. As to these latter points, as the learned Judge's judgment could not be reviewed until after the case could come on for trial, these objections were enlarged before the Judge at the trial.

Lash, Q.C., for the plaintiff.

Kingsmill, for the defendants.

In re MILLOY & THE CORPORATION OF ONONDAGA.

By-law—Animals running at large—Unreasonableness—Mode of enforcing penalty—Indians and Indian lands—Amending by-law after year from passing of original by-law.

By By-law No. 84, passed by the township of Onondaga on the 29th May, 1882, certain animals therein named were prohibited from running at large. Clause 5 provided that except between the 10th May and 1st December in any year, it should not be lawful for the owners of any other animals not thereinbefore mentioned or indicated to allow or permit the same to run at large. Clause 6 imposed a fine or penalty not exceeding \$5 for every offence, but the imposition of any such fine was not to relieve the animals from the operation of any by-law relating to pounds or pound-keepers, or for any trespass or damage committed or done by them, by reason of their being so permitted to run at large. Clause 7 provided for the recovery of fines or penalties (not adding the words "and costs") under sec. 421, *et seq.*, of the Summary Convictions Act, and, in the event of no distress, for imprisonment, etc., unless such fine or penalty and costs, including costs of committal, were sooner paid. By-law No. 97, passed on 9th July, 1883, after reciting that the object was to prevent all animals of any age or description running at large at all seasons of the year, amended by-law 84 accordingly. A motion to quash by-law 97 was made after the lapse of one year from the passing of by-law 84, but within the year after the passing of by-law 97.

Held, that the by-law was not oppressive and unreasonable as extending to all animals in all seasons of the year, inasmuch as the by-law was no wider than the statute under which it was passed.

An objection was urged that the provision of the by-law as to levying fines was *ultra vires*, in that sec. 492, s.-sec. 2, provided a mode of recovery, *i.e.*, by sale of the animal impounded, and hence that secs. 421, *et seq.*, did not apply; but held that this objection was taken under a misconception of facts in that the by-law was not, nor did it profess to be, a pound by-law; and it was by no means clear that these sections would not apply to a pound by-law.

Quare, as to the effect of the omission of the words "and costs" in the clause providing for the penalty, but as this was not taken in the rule, it was not considered.

A further objection was that the by-law should have been limited in its provisions so as not to extend to the Indian lands within the Township; but the learned Judge refused to quash on this ground (i) because the quashing a by-law is not imperative but discretionary; (ii) and if it were quashed the original by-law would remain; (iii) it would only be quashed as to the Indians and Indian lands; (iv) the applicant is not prejudiced and there is not a substantial objection; (v) and the Indians who are alone effected are not complaining.

The cases in which an amending by-law may be moved against after the expiry of a year from the passing of the original by-law considered.

Mackenzie, Q.C., for the applicant.

Wilson, Q.C., contra.

CHANCERY DIVISION.

[THE DIVISIONAL COURT, 17TH JUNE, 1884.

In re CORNISH.

Mechanics' Lien—Two successive contractors—Liens of creditors of first contractor—Computation of ten per cent.

A contractor having performed a certain amount of work on a building failed to complete it, whereupon his surety entered into an agreement with the owner to complete it. Creditors of the original contractor now claimed liens for material furnished.

Held, that the ten per cent. of the contract price which the owner was bound to retain to meet such liens should be computed upon the price payable to the original contractor for the work done by him.

Snelling, for the contractor.

A. Cassels, for the owner.

BANK OF TORONTO v. HALL.

Execution—Partnership and separate creditors—Priority of writs.

L. having a judgment against a firm of R. & Co., which was in insolvent circumstances, issued execution and directed the sheriff to levy the amount on the separate goods of R., a member of the firm. The plaintiffs had a subsequent execution in the sheriff's hands issued upon a judgment against R. individually, and the sheriff was directed on this writ to levy the amount on the goods of R. The sheriff sold R.'s goods and applied the proceeds, first upon L.'s execution, after verbal notice from the plaintiffs that they claimed the proceeds of R.'s separate property as applicable first to their writ. The plaintiffs then brought this action against the sheriff for a false return.

Held, Proudfoot, J., dissenting, reversing the judgment of Proudfoot, J., that L. had priority over the plaintiffs' writ on the separate goods of the debtor.

Per Proudfoot, J. The equitable principle of administering an insolvent estate between separate and partnership creditors should be applied, and priority given to the plaintiffs on the separate property of the debtor.

Robinson, Q.C., for the plaintiff.

G. T. Blackstock, for the defendant.

CAMPBELL v. COLE.

Married woman—Separate trader.

The plaintiff, a married woman, professed to be carrying on business separate from her husband, but the latter got his means of subsistence out of the profits of the business, took ready money as he pleased, was actively engaged in the management of the business, in buying and selling goods, conducting correspondence, keeping books, etc., and in the transaction in which the debt to the defendant was incurred appeared as principal, though both husband and wife swore that he was in all things but the wife's agent. The goods in the shop having been seized under the defendant's execution, and claimed by the plaintiff, the jury, in an interpleader issue, found for the plaintiff, but the Court set aside the verdict and directed judgment to be entered for the defendant.

Osler, Q.C., for the claimant (the wife).

Cassels, Q.C., and *Stonehouse*, for the execution creditor.

CANADA ATLANTIC RAILWAY CO. v. CITY OF OTTAWA.

Municipal by-law—Aid to railways—Validity of by-law—Naming day to take effect—Date of maturity of debentures—Dominion railway.

The judgment of Proudfoot, J., ante p. 85, was affirmed.

[19TH JUNE, 1884.]

In re WINSTANLEY & CARRICK.

Will, construction of—Devise in fee simple—Partial restraint on alienation.

After devising certain land to one of his daughters, the testator proceeded, "The remaining lot * * I bequeath to my daughter, E. R., and that she shall not dispose of the same only by will and testament, and if either of my daughters shall depart this life without

leaving issue, then and in such case, the survivor shall be possessed of the share of the deceased sister."

Held, on appeal from the judgment of Proudfoot, J., 3 C. L. T. 596. that E. R. took an estate in fee simple with an executory devise over, but that the restriction upon alienation, being partial, was valid.

J. H. Macdonald, for vendor.

W. N. Miller, for purchaser.

[BOYD, C., 19TH JUNE, 1884.

MARTIN v. EVANS.

Judgment—Action to set aside invalid assignment—Technical defect in judgment—Partnership and separate creditors—Costs.

In an action on a County Court judgment to set aside an assignment for creditors as invalid, it is no defence that the County Court judgment was signed in pursuance of an order under Rule 324, which was made in Chambers instead of in Court, the time for moving against it in the County Court having elapsed.

An assignment by a partner of his separate estate which placed his partnership creditors on an equality with his individual creditors was held bad as to personalty as against creditors; but in granting this relief to the plaintiff, an execution creditor of the partner, the Court refused him his costs if he insisted on his priority with respect to the assets which were released from the assignment by this judgment, but ordered the costs to be paid out of the fund if he should agree to a ratable distribution.

The law respecting the administration of insolvent estates between partnership and separate creditors discussed.

M. Wilson, for plaintiff.

C. R. Atkinson, for defendant.

[PROUDFOOT, J., 25TH JUNE, 1884.

BALL v. THE CROMPTON CORSET CO.

Patent of invention—Inventor—Infringement—Patentable article—Mechanical equivalent.

F. was the patentee of an article, and in an action for alleged infringement of the patent, the defendants set up that S. was the inventor. It appeared that F. and S. applied in the U. S. A. for a joint patent, both alleging that the article was F.'s invention. Being told that a joint patent

could not be granted, the invention was patented in F.'s name alone. S. afterwards interfered, and evidence was taken, but S. finally abandoned his claim, as he said, for want of means to prosecute it.

Held, on this evidence, that the defence that S. was the inventor was not made out.

The plaintiff's patent was for an article known as "Florsheim's Gore," part of the description of which was, "in an elastic gore, gusset, or section * * the springs arranged in groups and made of a continuous length of coiled wire." The defendants manufactured a similar gore, the only variation being that, instead of continuing the coiled spring from group to group of the springs, they severed the wire and connected the groups of springs with a cord.

Held, merely an attempt to evade the patent, and that it was an infringement.

A patent was granted in England, in 1866, to M. for improvements in the manufacture of elastic gussets, whereby instead of weaving india rubber springs into the fabric, the india rubber springs were secured between the two pieces of material by stitching in parallel lines along each side of the rubber spring; and instead of inserting rubber springs in separate pieces, the rubber, after traversing the fabric, was turned round and caused to return parallel to its first course, and secured by stitching the fabric alongside of it as before, thus making a continuous spring. A process of puckering the fabric in stitching it was also described in the patent; and a mode of making a margin of in elastic material. The plaintiff's patent substituted a coiled wire spring for india rubber, and inclosed it in a tube, and arranged the tubes in groups; the springs did not extend to the margin, but were stayed at their ends by inelastic material; and the spring was continuous.

Held, that the coiled wire was only a mechanical equivalent for the india rubber spring, and, that it did not possess any element of invention.

Held, also, that the arrangement of the tubes in groups was not new, nor was it a patentable invention.

Cassels, Q.C., and Akers, for plaintiff.

MacLennan, Q.C., Osler, Q.C., and Biggar, for the defendants.

[FERGUSON, J., 14TH MAY, 1884.]

GARDINER v. CHAPMAN:

Riparian proprietor—Canal—Polluting waters—Injunction—Rideau Canal—Waters—Rights of riparian proprietors.

Held, that the plaintiff was entitled to an injunction restraining the defendant from constructing certain works which would interfere with the plaintiff's rights as a riparian proprietor on the banks of the Rideau Canal.

There was a continuous sheet of water from the plaintiff's land to the track of vessels navigating the canal of sufficient depth to be navigable for boats of considerable size. This sheet of water was not part of the canal proper, though a portion of the river through the bottom of which the canal was constructed.

Held, that the plaintiff had the same rights in respect of this sheet of water as he had in respect of the canal under the Act 8 Geo. IV., cap. 1, sec. 157, which enacts that it shall be lawful for owners and occupiers of lands adjoining the canal to use any boats thereon for the purpose of husbandry, etc.

Walkem, Q.C. and *J. B. Walkem*, for plaintiff.

Britton, Q.C. and *McIntyre, Q.C.*, for defendant.

[11TH JUNE, 1884.]

HILL v. HILL.

Administration—Accounts—Costs of establishing second will—Allowance to executor of first will—Tenant for life—Repairs—Costs.

The defendant being executrix under a first will paid out of the estate the costs of an action brought to test the validity of this will as against a subsequent will which resulted in the second will being established. The evidence at the trial showed that for many years the testator had been mentally and physically weak and many witnesses thought that he was incapable of making a will at the time the second was made. Under an order of reference to take the accounts of the defendant as executrix under the first will the Master allowed to the defendant in her accounts the amount of costs paid.

Held, on appeal, that the Master rightly allowed them.

The defendant was tenant for life under the will, and the testator further devised to her the income of all investments of which the testator died possessed for her own use, and also the principal of such investments as she might require to use for her own benefit. She repaired the buildings on the land of which she was tenant for life out of the investments bequeathed to her, and the Master allowed her this sum in her accounts.

Held, that the amount was properly allowed.

The defendant took out probate under the first will and acted as executrix thereunder until the second will was established. The judgment in this case directed a reference to ascertain the amount with which she was chargeable, and an account of her dealings with the estate.

Held, that the costs of all parties, including the defendant, should be paid out of the estate.

Plumb, for the plaintiff.

Howell, for the defendant.

[12TH JUNE, 1884.]

CLARKE v. THE UNION FIRE INSURANCE COMPANY.

Contract of insurance—Lex loci contractus—Agency.

The defendants signed and sealed policies in blank and sent them to an agent in New York, who, on effecting an insurance, filled up and issued them. The policy in this case was delivered 8th August, 1880, the fire occurred 10th August, and the premium was paid 11th August by cheque, which cheque was accepted by the New York agent and forwarded to Toronto to the company's head office, but was returned by the company and refused.

On an attempt to prove a claim under the policy in the Master's office, it was contended that the filling up and the issuing of the policy in New York brought the contract within the laws of the State of New York, and that the acceptance by the agent there (which was a cheque payable to the order of the company) would bind the company; but the Master held that the contract was made in Toronto where the policy was signed and sealed.

Held, on appeal from the Master, that his ruling was right, that the contract was governed by the law of Ontario; that the law defining the insurer's engagements is that of the place where the corporation has its seat; that the agent in New York had no authority to bind the company by any contract not in accordance with the policy sued on, and that he had no power to settle any disputed matters, as they had to be referred to the principal whose place of business was in Ontario.

Foster, for the plaintiff.

Bain, Q.C., and *A. C. Galt*, for the defendants.

Falconbridge, for the claimants.

[30TH JUNE, 1884.]

HILL v. MACAULAY.

Assessment and taxes—Invalid assessment—Tax sale.

Where the plaintiff's land was assessed as one with that of another proprietor adjoining it for several years and was finally sold for the arrears of taxes so charged.

Held, that the assessment was bad and the sale void.

Held also, that the case did not come within R. S. O. cap. 180, sec. 118, which provides that the Treasurer may, on receiving satisfactory proof that any parcel of land on which taxes are due has been sub-divided, receive the proportionate amount of tax chargeable upon any of the sub-divisions,

and leave the other sub-divisions chargeable with the remainder; and that he may divide any parcel returned as in arrear into as many parts as the necessities of the case may require.

Dougall, Q.C., and Holton, for the plaintiff.

Cassels, Q.C., and Clute, for the defendant.

CARLING BREWING CO. v. BLACK.

Assignee in trust for creditors—Notice of creditors' claims—Distribution—Liability of trustee.

The defendant was assignee of B. in trust for creditors. After the assignment he got possession of B.'s books, and in the ledger saw that the plaintiffs were credited with a certain sum. B. also told him that the plaintiffs had sued him, and it appeared that writs of execution were in the sheriff's hands. The defendant inserted a notice in the local newspapers for creditors to send in their claims, and that he would distribute the estate on or before a certain day, having regard only to those claims of which he had notice. The plaintiffs did not send in their claim, but wrote to the defendant advising him of it, which notification the defendant said he received on the day of the distribution of the estate, but after he had sent off to the creditors bank drafts for their dividends. He made no effort to stop payment of the drafts.

Held, that the defendant had notice of the plaintiffs' claim within the meaning of 46 Vict. cap. 9, sec. 1, and that he was liable to the plaintiffs for the amount of their dividend.

Street, Q.C., for the plaintiffs.

Meredith, Q.C., for the defendant.

IN CHAMBERS.

[THE MASTER IN CHAMBERS, 17TH JUNE, 1884.]

MOORE v. MOORE.

Alimony—Costs—32 Vict. cap. 18. sec. 2.

An application to compel the defendant to pay the costs of the plaintiff's solicitors of an action for alimony. The action was settled before trial, the plaintiff returning to live with the defendant, and the defendant agreeing to pay the plaintiff's solicitors' costs.

Held, that before the Act 32 Vict. cap. 18, the defendant would have been liable to pay the costs.

Held, under the wording of sec. 2 of the above Act, that the plaintiff had not failed to obtain the decree for alimony within the meaning of the Act, and that the defendant was therefore liable to pay costs.

Hoyles, for the application.

H. Cassels, contra.

Division Court, Simcoe.

[Boys, J.J.]

ELLIOTT v. GLADSTONE.

*Chattel mortgage to secure endorser of a promissory note—Days of grace—
Extension of liability over a year.*

This was an interpleader issue to try the property in certain goods seized under attachments issued by the defendants against the goods of an absconding debtor, and claimed by the plaintiff under a chattel mortgage. The mortgage was given to secure the plaintiff against the indorsement by him of a promissory note for \$800, and was dated 29th January, 1884. The note read as follows:—"I promise to pay on the 28th January, 1885, etc."; the addition of the three days grace extended the liability over a year from the date of the mortgage.

Held, that the mortgage was bad.

NEW BRUNSWICK.

In the Supreme Court.

[JUNE, 1883.]

DELANEY, *qui tam*, v. McDONALD.

Fisheries Act (31 Vict. cap. 60.)—Riparian proprietors in New Brunswick who acquired titles prior to 1st July 1867.

The provisions of section 7, s.-s. 7 of The Fisheries Act (31 Vict. cap. 60) do not apply to riparian proprietors in this Province whose titles were acquired prior to 1st July, 1867.

DRISCOLL v. THE MILLVILLE MARINE INSURANCE COMPANY.

Marine insurance—Freight—Policy on—Cargo forwarded to destination by another vessel at same rate of freight—Total loss—Owner of vessel prima facie entitled to freight—Preliminary proofs—Sale of vessel by master—When allowance—Abandonment to underwriters—Reasonable time to make enquiries after hearing of loss—Waiver of notice of abandonment—Foreign Commission—Return by one commissioner—Omission of defendants' commissioner to put cross-interrogatories—Effect of—Endorsement of return on commission.

Freight, as a subject-matter of insurance, means the benefit derived by the ship-owner from the employment of the ship; and the contract of insurance against loss of freight is that the ship shall not be prevented from earning it by the perils insured against.

Where a vessel (the freight of which was insured) was lost, and the master forwarded the cargo to its destination by another ship, paying therefor the same freight which he was to receive,

Held, that the shipowner was entitled to recover for a total loss of freight.

The owner of a vessel is *prima facie* entitled to her freight.

When the conditions of a policy on freight require that proof of interest and of the loss and adjustment should be given to the underwriters before bringing an action, the plaintiff cannot recover unless such preliminary proof is given.

In order to justify the sale of a vessel by the master, there must be urgent necessity for it, and what circumstances will constitute a case of necessity in a mercantile sense, is a question for the jury.

The owner of a vessel which has been damaged by the perils insured against is entitled to a reasonable time to make enquiries after hearing of the damage, before giving notice of abandonment.

Where the owners of a vessel so damaged gave notice of abandonment, which the underwriters refused to accept, the owner then telegraphed to the master to "follow best advice," whereupon the master having had a survey of the vessel, by which it was found it would cost more to repair her than she would be worth, sold her by auction.

Held, Per Allen, C. J., Wetmore and King, JJ., (Weldon, J., dissenting) that these instructions did not constitute a waiver of the notice of abandonment, and that there was evidence of a constructive total loss to leave to the jury.

Per Weldon, J. The plaintiff was only entitled to recover nominal damages.

A commission for the examination upon interrogatories of witnesses abroad, was taken out by the plaintiff directed to two commissioners—one named by each party—and authorising the plaintiff's commissioner to return the depositions certified by him, also to proceed *ex parte* with the examination of the witnesses and the execution of the commission in case the defendants' commissioner refused or neglected to attend. The defendants' commissioner attended the examination, cross-examined the witnesses, and asked some of the cross-interrogatories, but, without giving any reason, refused to sign the certificate of their examination.

Held, Per Allen, C. J., and King, J. (i) That the certificate of the plaintiff's commissioner was sufficient. (ii) That if the signing of the certificate was a part of the execution of the commission, the refusal of the defendants' commissioner to sign authorized the plaintiff's commissioner alone to sign. (iii) That the omission of the defendants' commissioner to put some of the cross-interrogatories was no ground for rejecting the depositions.

Per Wetmore, J. The plaintiff's commissioner should have put the cross-interrogatories to the witnesses; but the omission to do so was only an irregularity which should have been taken advantage of by an application to a Judge to quash the depositions,

It is not necessary that the commissioner should endorse a return on the commission.

SAYRE v. LEBLANC.

Controverted Elections Act—Petition under Con. Stat. cap. 5—Resignation of respondent—Abatement of petition.

Where a member elected to the Local Legislature, against whom a petition has been presented under the Con. Stat. cap. 5, relating to controverted elections, voluntarily resigns his seat, the petition is thereby abated, and a Judge has no power to proceed with the trial.

NEW BRUNSWICK RAILWAY CO. v. ARMSTRONG.

*Negligence—Railway Company—33 Vict. cap. 49—Evidence—Sufficiency of
—Fencing railway.*

In an action against a railway company for negligently killing the plaintiff's mare, he proved that on the night of the 13th October the train was stopped while passing through or near his land, and that a passenger on the train saw the conductor and some of the other men employed on the train, examining a mare which was lying at the foot of an embankment near the railway, and unable to rise without assistance; that early the next morning the plaintiff's mare was found dead near the same place, with several of her ribs broken, and that she had been grazing about there the previous evening, and was then uninjured.

Held, that there was sufficient evidence to leave to the jury that the mare which the conductor was examining the previous night was the plaintiff's mare.

By Act 33 Vict. cap. 49, a railway company was required to fence the sides of their road where it passed through enclosed or improved land; they put up a fence, but allowed it to get out of repair, in consequence of which a horse strayed on the railway and was killed by the engine.

Held, in an action for killing the horse, that the defendants were bound to show that the land where the horse was killed was not improved, so as to bring themselves within the exception in the Act.

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No. 11.

THE OPERATION OF THE STATUTES OF LIMITATIONS UPON THE ESTATE OF A MORTGAGEE.

IT is clear that the payment of interest which shall have the effect of removing the bar of the Statute of Limitations, pleaded to a bill filed for the foreclosure and sale of mortgaged premises, cannot be made by a stranger, but must be made by the party liable to pay the debt. But the term "the party liable to pay" is ambiguous. It may mean the person whose obligation is deduced *ex contractu* from the bond, or the covenant contained in the mortgage, or from some collateral agreement. On the other hand it may indicate the owner of the equity of redemption. The mortgagor is, of course, liable both *ex contractu*, and as owner of the equity of redemption; and with reference to him this distinction has no place. But when by alienation *inter vivos*, or by descent, or by devise, the equity of redemption passes out of the mortgagor, it becomes material to consider in which of these two senses that term is used in the various sections of the principal Statute of Limitations, 3 & 4 Wm. IV. cap. 27. A review of the authorities develops the doctrine that the expression, "the party liable to pay," where it occurs in that enactment with reference to a suit brought to realize a lien upon land, indicates the owner of the land subject to the charge, whether that charge is a mortgage, a judgment, or some other lien, and not the person whose obligation is deduced *ex contractu* alone.

It will be convenient to consider the subject under three heads. First, what was the state of the law before the passing of the Act 3 & 4 Wm. IV. cap. 27? Secondly, to what extent was the law altered by that enactment? And thirdly, what is the effect of the subsequent supplementary and enabling Act, 1 Vict. cap. 28?

Before the passing of the Act of Wm. IV. the doctrine of non-adverse possession prevailed. The construction which Courts had placed upon previous Statutes of Limitations had restricted their operation to cases where the estate of the true owner had been reduced to a mere right of entry by one of those injuries to the freehold known to the Common Law as abatement, intrusion, disseisin, discontinuance, or deforcement. In these cases, the wrong-doer claiming to be the freeholder had either dispossessed the true owner, or excluded him from the enjoyment of his estate. In each of them the period of limitation ran in favour of the wrong-doer from the commission of the wrong. But non-adverse possession, that is to say possession acquired or retained with the consent of the true owner, as it did not partake of the nature of a wrong, so it was held to have no effect in divesting the true owner of his estate in the land. But the exigencies of modern society required that long continued possession, whether adverse or permissive, should not be disturbed. The doctrine of non-adverse possession was consequently abolished by the statute 3 & 4 Wm. IV. cap. 27; and in its place there was enacted the clear and simple rule that, in the absence of tenure, where possession of land had been maintained for a period of twenty years by one who was not the true owner, without payment of rent or a written admission of the title of the owner, the party in possession should acquire the absolute estate of inheritance in the land. "The statute," says Baron Parke, "makes a parliamentary conveyance of the land to the person in possession after the period of twenty years has elapsed" (a). It is open to doubt, however, whether this statement of the law

(a) *Doe dem. Fukes v. Sumner*, 14 M. & W. 38.

is strictly accurate. For if the lapse of the statutory period does not merely bar the remedy, but also extinguishes the right, it is difficult to conceive how the statute can convey that which no longer exists.

The effect of the statute upon the estate of a mortgagee in fee, which at first somewhat perplexed the Courts, is now made clear by judicial decisions.

The term "land" is defined by the Act to include all "corporeal hereditaments."

Section 2 enacts that "no person shall make an entry, or bring an action to recover any land, but within twenty years next after the time at which the right to make such entry shall have first accrued." Now, the estate of a mortgagee in fee has been held (b) to be such an interest in land as will pass only by a deed duly acknowledged and registered. It therefore falls within the term, "corporeal hereditaments," and is consequently included in the term "land." Section 2 must then be held to include the estate of a mortgagee in fee, and to impose the same limitation upon an action at law brought by a mortgagee to assert his title to the land as was imposed upon the assertion of the title of any other owner in fee. The judgment of the Court of Exchequer in *Doe dem. Roylance v. Lightfoot* (c) is an authority for the proposition that the right of entry of a mortgagee accrues upon the execution of the mortgage and not when the debt becomes due.

Two provisoes were engrafted upon section 2 for the purpose of modifying its rigor. Section 3 provides that a payment of rent shall interrupt the course of the statute. And by section 14 a similar effect is attributed to a written acknowledgment. If, therefore, a mortgagee in fee is within the scope of section 2, he must be entitled to the benefit of the provisoes contained in sections 3 and 14. But if he should collect rent from the person in possession of the mortgaged premises, he would become subject to the onerous obligations of a mortgagee in possession. And it

(b) *Doe dem. Burnham v. Watts*, 2 Kerr (N. B. Rep.) 441.

(c) 8 M. & W. 553.

would not occur to him to require a written acknowledgment from the person who is in process of acquiring the estate. Neither of these provisoes, therefore, would be of any practical value to a mortgagee. But, according to the usual course of business, he receives the interest upon his investment from the owner of the equity of redemption. Suppose, then, that after having received interest in this manner for a period of twenty years, he should file a bill for the foreclosure and sale of the mortgaged premises; and that the defendant should plead the Statute of Limitations. The right of entry of a mortgagee in such a case would be barred by section 2. And where the right of entry is barred by section 2, the title of the mortgagee is extinguished by section 84.

Section 40 enacts as follows:—"No action or suit or other proceedings shall be brought to recover any sum of money secured by any mortgage, judgment, or lien, or otherwise charged upon, or payable out of, any land, at law or in equity, or any legacy, but within twenty years next after a present right to receive the same shall have accrued to some person capable of giving a discharge for, or a release of the same, unless in the meantime some part of the principal money, or some interest thereon, shall have been paid; or some acknowledgment shall have been given in writing signed by the person by whom the same shall be payable, or his agent."

If the title of the mortgagee is extinguished by the preceding sections, it certainly is not revived by section 40.

It was to remedy this evil that the Act 1 Vict. cap. 28 was passed. But, before entering upon the discussion of that Act, it is desirable to investigate the meaning of the term "the party by whom interest is payable" in section 40, and the other sections of the Act 3 & 4 Wm. IV. cap. 27. For although section 40 cannot be read to confer a right upon a mortgagee, it seems to be taken for granted by the House of Lords in *Chinnery v. Evans* (d), that it may be relied upon by a defendant for the purpose of

(d) 11 H. L. C. 115.

defeating the claim of a plaintiff who sues as mortgagee to recover the money charged upon the land, by the sale of the estate.

The first of these authorities is the case of *Bolding v. Lane* (e), which turned upon the meaning of the term "the party liable to pay" in sec. 42 of cap. 27. That section created a bar to any proceeding to collect interest in arrear on a mortgage for any period exceeding six years, unless during that time an acknowledgment in writing of the title of the mortgagee had been given by the party liable to pay. In applying this decision to the construction of the Act, it must be borne in mind that, according to the opinion of the House of Lords in the case of *Chinnery v. Evans*, precisely the same effect must be attributed to a written acknowledgment, as to a payment of interest, in removing the bar of the statute. It appeared in the case of *Bolding v. Lane* that two successive mortgages had been made of the same parcel of land. The first mortgagee, wishing to assign his security, procured the concurrence of the mortgagor in an instrument of assignment which contained a recital of the amount of interest in arrear. A suit for the foreclosure and sale of the mortgaged premises having been brought, the second mortgagee pleaded the Statute of Limitations, and relied upon section 42 of 8 & 4 Wm. IV. cap. 27. Vice-Chancellor Stuart overruled the plea. But Lord Westbury, L. C., on appeal reversed his decision. "If," says his Lordship, "the opinion of the Vice-Chancellor be well founded, then according to the true intent and meaning of the statute the right of one man may be taken away by the act of another. If the second mortgagee be in possession, and the first mortgagee seeks to recover his principal and arrears of interest for twenty years by a sui. for foreclosure and sale, is the second mortgagee to be at liberty to plead or insist upon this enactment? It is impossible to deny his right so to do. But according to this decision, if the first mortgagee obtains at any time the acknowledgment in writing of the mortgagor,

(e) 1 DeG. J. & S. 122.

or his representatives, the right of the second mortgagee is defeated. That is to say, the mortgagor or his representatives, who may have no interest whatever in the lands, for the ultimate equity of redemption may not be worth a shilling, shall be able to charge the estate anew with any amount of arrears of interest, as against the second and subsequent mortgagees. The Court is bound, by every principle of judicial interpretation, to find, if possible, a construction of the statute which does not involve consequences so inconsistent with natural justice. Speaking with great respect to the Vice-Chancellor, the vice of the decision lies in the limited interpretation which is put on the words by whom the same was payable. These words do not denote merely the persons who are legally bound by contract to pay the interest, but all the persons against whom the payment of such arrears may be enforced by any action or suit, and by whom therefore, as they have a right to pay such interest in redemption of their land, interest may be properly said to be payable. If a legacy is by will charged upon land which is then specifically devised, the devisee is not liable by any contract to pay the legacy or the interest thereon, but he is nevertheless a person by whom such legacy and interest are payable; for he is entitled to redeem the lands devised to him." Lord Westbury consequently held that the liability indicated by the statute was not derived *ex contractu*, but from the interest of the person making the payment or giving the acknowledgment in the land subject to the charge; and that the legal effect of the acknowledgment should be limited to that interest. This interpretation of the term "the party liable to pay" reconciles all the sections of the statute. For section 28 provides that if joint mortgagees enter into possession of the mortgaged premises, an admission of the title of the owner of the equity of redemption given by one of the mortgagees shall preserve the right of redemption against him, but shall give no right to redeem against the other mortgagees in possession.

In the case of *Toft v. Stephenson* (f), it appeared that a
(f) 1 DeG. M. & G. 28.

contract in writing had been made for the sale of a parcel of land. The purchaser became insolvent and assigned all his property to trustees for the benefit of his creditors. The trustees entered into possession of the land and continued to occupy for a period exceeding twenty years, but gave no admission of title to the owner of the land except such as was contained in a letter written by their attorney in answer to a letter from the plaintiff's attorney, demanding payment of the purchase money. The unpaid vendor filed a bill against the trustees to realize his lien. The defendants pleaded the Statute of Limitations, and contended that the liability to pay the debt, which was an essential qualification of the person giving the acknowledgment, was a liability deduced *ex contractu* alone; and that the insolvent debtor who had entered into the contract was the only person competent to give the admission which should remove the statutory bar. But the Court overruled the plea, saying "The defendants are liable to pay the debt in the only sense in which any one is liable at all; that is to say, unless they pay the debt they will lose their land, and it is obviously in that sense that the statute in such a case speaks of the money as payable."

The leading case upon the question under discussion is *Chinnery v. Evans (g)*. In that case it appeared that the owner of three lots of land in Ireland, one of which was situated at Cork, another in Limerick, and a third in Kerry, mortgaged those lands in fee. After a few years he failed to pay the interest on the mortgage, and a receiver was appointed by the Court, on the application of the mortgagee, over all the mortgaged premises. The receiver entered into possession of the Limerick lot only, and out of the rents of that lot paid the interest on the mortgage. After the appointment of the receiver, the owner of the equity of redemption conveyed the Cork and Kerry lots to *bona fide* purchasers for valuable consideration. The purchasers entered into possession of the lots which they had purchased, and remained in possession for a period exceeding twenty years, without paying interest or giving a written admission

(g) *Supra*.

of the title of the mortgagee. A bill having been filed for the foreclosure and sale of the mortgaged premises, the purchasers of the Cork and Kerry lots pleaded the Statute of Limitations, and relied upon section 40 of 3 & 4 Wm. IV. cap. 27. It appeared that all the original parties to the security had been changed. The mortgage was made in 1776, and had been assigned to the respondent. The final decree was made in 1864. If the mortgagor had survived and been made a party to the suit, he would have been upwards of one hundred and ten years of age at the date of the decree. It may therefore be inferred either that he had conveyed away his estate in the Limerick lot, or that that estate had devolved upon his heir or devisee. Here it is evident that the payments of interest made by the receiver were made by the person who alone was entitled to collect the rents of all the parcels of land subject to the mortgage. But where the mortgagee has regularly received his interest from the only person entitled to collect the rents of all the mortgaged premises, it could be tolerated neither as a matter of law nor as a matter of business that he should be bound to go further and investigate the state of the accounts between the person who has paid the interest and the tenants or occupiers of the various parcels of the equity of redemption. Again, the receiver was appointed by the Court at the instance of the mortgagee. Whose agent, then, was he? Was he the agent of the mortgagee? If he had been the agent of the mortgagee, it would have been clearly impossible to attribute any legal effect whatever to a payment of interest made to the mortgagee by his own agent, that is to say, if such an expression be permissible, by himself. But the Court held that the receiver was the agent of the owner of the equity of redemption.

Now, it is an elementary doctrine of the law of agency that the authority of an agent is revocable at the will of the principal. But in this case the authority of the agent was not revocable at the will of the principal. For, if that authority could have been revoked, then it would have been within the power of a debtor, against whom a decree of a competent Court had been made, by his own act to rescind

that decree—a proposition which is absurd. Consequently that authority was not revocable ; nor was it revoked when the equity of redemption in the Cork lot was conveyed to one purchaser, and the equity of redemption in the Kerry lot to another. The agency of the receiver was a shifting agency, following the lands into whose hands soever they might come. Consequently when the receiver paid the interest on the mortgage, the payment was made by all the owners of the several parcels of the equity of redemption. The payment was not made by the owner of one of the parcels of land included in the mortgage, as might be inferred from a superficial examination of the report, but by all. Such seems to have been the opinion of Lord Wensleydale where he says in his judgment in that case, at page 142, “The payment of interest was made not only by the owner of the Limerick lot, but by the owner of the Cork lot and the owner of the Kerry lot.” Counsel for the mortgagee, upon the argument of the appeal, was able to point to evidence of a series of payments of interest made by all the persons interested in the equity of redemption. He therefore contended that the liability to pay the debt, which under the statute is an essential qualification of the person making the payment, must be derived from his interest in the land subject to the charge. On the other hand, counsel for the owners of the equity of redemption was able to point to the absence of evidence of any payment of interest by any person whose liability to pay the debt was derived from contract alone. He therefore contended that the liability indicated by the statute was derived *ex contractu*. The House of Lords, balancing these propositions against each other, sustained the contention of counsel for the mortgagee. It is conceivable that the decree of the Lords may be equivalent to a judicial declaration that the liability indicated by the statute may be derived from either of these two sources. If such had been the opinion of their Lordships they certainly would have stated that opinion in explicit terms. But no such view can be found in the judgments delivered in that case, either in express language or by necessary implication.

But the doctrine which the Lords intended to lay down in the case of *Chinnery v. Evans* is not a matter of mere conjecture, for the Court of Appeal in the case of *Harlock v. Ashberry (h)*, which as will be shown hereafter must be treated as a binding authority, have held that the principle which underlies the decision of the Lords is a principle upon which all Statutes of Limitations are based, that is to say, that the payment which shall remove the bar of the statute must amount to an admission. But the only person competent to make an admission is the owner of the land, subject to the charge. Therefore the only person whose payment of interest will remove the bar of the statute is the owner of the equity of redemption, who is liable to pay the debt in this sense, that if he does not pay it he will be deprived of his estate by process of law. Lord Westbury in his judgment in the case of *Chinnery v. Evans*, sets forth the argument *ab inconvenienti* as a reason for his opinion in the following language:—"It is contended that great inconvenience would ensue if the mortgagee, the existence of whose encumbrance might actually be unknown, should be at liberty after sixty or seventy years to make a demand upon the proprietor of the estate originally comprised in the mortgage, but which has been sold fifty or sixty years before. On the other hand it is said that the injustice to the mortgagee would be very great indeed, if, while continuing to receive from the person liable to pay the interest due upon his mortgage he was to be deprived, by the act of the parties entitled to the equity of redemption only, of the estate comprised in the mortgage. And I think it plain that considerations of justice, and of general convenience, and expediency, prevail in favour of the latter view."

If this language were read apart from the facts to which it was applied, it might seem to be in conflict with the views here suggested. But the language of judges delivering judgment must always be read with reference to, and must be limited by, the facts in evidence before them. If his Lordship had intended to lay down the rule that the

payment of interest contemplated by the statute is a payment by a person liable *ex contractu*, he must have given judgment for the owner of the equity of redemption ; for there was no evidence before the Court of any payment by any person liable in that capacity. But he concurred in the judgment in favor of the mortgagee. His language, therefore, if read with reference both to the facts in evidence and the conclusion at which he arrived, must be interpreted to lay down the rule, that the payments must be made by the person liable to pay as owner of the land subject to the charge.

The judgment of the Court of Appeal in the case of *Sutton v. Sutton* (i), affirms the proposition that, where an action is brought *ex contractu* to recover a sum of money secured by a collateral charge upon land, the Statute of Limitations appropriate to such a case is 3 & 4 Wm. IV. cap. 27, sec. 40, and not the Statute of Limitations in personal actions. An action on the bond collateral to a mortgage is an action at law contemplated by sec. 40. A bill filed for the foreclosure and sale of mortgaged premises is a suit in equity contemplated by the same section. In either case, a payment of interest made by the person "by whom the same shall be payable" removes the bar of the statute. But the expression, "by whom the same shall be payable," varies in meaning, according to the subject matter to which it is applied. As applied to an action at law, it means the obligor or his personal representatives. As applied to a suit in equity it has been repeatedly held that it is capable of being interpreted to designate the owner of the land subject to the charge. But when that expression has received one interpretation, with reference to one of these proceedings, its meaning *quoad* that proceeding is surely exhausted. It cannot be capable of both meanings, with reference to the same subject matter. As was observed by Professor Jowett (Essays and Reviews, p. 366), "We do not at once see the absurdity of the same words having many senses." And yet that absurdity would exist if a

(i) L. R. 22 Chy. Div. 511.

payment of interest by a person liable *ex contractu* alone, were held sufficient to remove the bar of the statute in a suit brought to realize the debt by a sale of the mortgaged premises.

The third branch of the subject—the true intent and meaning of the Act 1 Vict. cap. 28—remains to be discussed. This Act permits an action at law, or suit in equity to recover the land, to be brought within twenty years after the last payment of interest. As it is an enabling Act, a mortgagee who seeks the benefit of its provisions must bring his case within its terms. The action at law to recover land is clearly an action of ejectment. A suit in equity to recover land has been defined by Lord St. Leonards in *Wrixon v. Vize* (j), and by the House of Lords in *Heath v. Pugh* (k), to be a proceeding whereby the mortgagee acquires the equity of redemption under a new title by judicial decree in satisfaction of the debt. This definition excludes the suit for the foreclosure and sale of the mortgaged premises, for in such a proceeding the decree is not a satisfaction of the debt. The mortgagee, if he pursues his remedy in the latter form, may recover the balance of his claim (if any) by action on the bond. Brett, L.J., in his judgment in the case of *Harlock v. Ashberry* (l), thus defines the Act, "It seems to me that the statute is an enabling statute, because a bar in the case of an action for the recovery of land is put by 3 & 4 Wm. IV. cap. 27, sec. 2; but seeing that that enactment is more rigorous than any Statute of Limitations before that time, the 1 Vict. cap. 28 made a modification of the more rigorous statute, and must be read with it as a modification, and in the nature of a proviso upon the earlier statute." Two provisos—the payment of rent and the written admission of title—having been engrafted upon section 2 of chapter 27 for the benefit of the owner of the land, whether he held under an absolute title or under a mortgage title, an additional proviso—the payment

(j) 3 Dr. & W. 104.

(k) L. R. 7 App. Cas. 235.

(l) *Supra*.

of interest—was also by the later Act engrafted upon the same section for the purpose of saving the title of the mortgagee from the operation of the statute. But who was the person who could make the payment of rent, or give the written admission of title, intended by the statute? It was clearly the person in possession of the land in whose favour the statute was running. And who was the person who could make the payment of interest intended by the later Act? It was clearly, again, the person in possession of the land in whose favour the statute was running, that is to say, the owner of the equity of redemption. Such was the opinion of the Court of Appeal in *Harlock v. Ashberry*. It appeared in that case that a mortgagee in fee, whose security included three parcels of land, had exacted a payment of rent from the tenant of one of them. A suit having been brought for foreclosure and sale of the mortgaged premises, it was changed by amendment to a strict foreclosure to bring the case within 1 Vict. cap. 28. The question to be decided was whether the legal effect of the payment of the rent should be limited to the land in the occupation of the tenant, or whether it should be extended to all the land which was originally subject to the charge. The Court dismissed the bill as to all the land except the parcel occupied by the tenant who had paid the rent. It has been objected to the authority of this decision, that the Court could have disposed of the case by simply affirming that a payment of rent was not a payment of interest, and that any abstract general principle which the Court might lay down, other than that very obvious proposition, must be treated as *obiter dictum* merely. But the Court did not on that occasion depart from those principles upon which the whole of the Common Law has been developed. It has been the invariable custom of Courts when any question of difficulty has been brought before them for judicial decision, in the first place to ascertain whether the decided cases furnish any general rule applicable to the subject. In the second place, having ascertained and stated the general rule, if any has been laid down, they proceed to consider whether the party to the litigation who seeks to disturb an existing

state of facts has adduced evidence sufficient to bring his case within that rule. If he has not, they decide in favour of the opposing party upon the maxim "semper presumitur pro negante." Acting upon these principles, the Court in the first place develop from the judgment of the House of Lords in *Chinnery v. Evans* the doctrine that the payment of interest intended by the statute is a payment by a person liable to pay the debt as owner of the land subject to the charge. Secondly, they decide that the evidence adduced by the mortgagee did not satisfy that rule. The judgment of the House of Lords, they say, was founded on the idea that every payment which shall have the effect of removing the bar of the statute must amount to an admission. From this general rule, Jessel, M. R., proceeds to deduce another rule, that is to say, that the payment must be made by the person liable to pay. But this derivative rule cannot be construed in a sense more extensive than the rule from which it is derived. The party liable to pay under the second rule must be a person competent to make an admission under the first rule. But the only person who can make an admission affecting the land is the owner of the equity of redemption. He, then, is the only person whose payment of interest will be an answer to a plea of the Statute of Limitations, pleaded to a bill filed for the foreclosure and sale of mortgaged premises. The term "the party liable to pay," under 3 & 4 William IV. cap. 27, having been thus defined, the Court held that the Act, 1 Vict. cap. 28, having been passed *in pari materia* with it, should receive a similar interpretation. They consequently held that the "payment" referred to in the later Act must be made by the owner of the equity of redemption.

The case of *Doe dem. Palmer v. Eyre* (m) was an action of ejectment brought by a mortgagee under 1 Vict. cap. 28. It appeared that the parcel of land for the recovery of which the action was brought was in the possession of a tenant at sufferance; and as is always the case where such

(m) 17 Q. B. 366.

a tenancy exists, the statute began to run in favour of the tenant from the inception of the tenancy. The tenant remained in possession for a period of twenty years, without paying rent; consequently, at the expiration of that period, the title of the landlord was transferred to him by the operation of the statute. But before this result had been arrived at, the landlord mortgaged his reversion in fee and paid interest on the mortgage for thirty-eight years. The mortgagee brought the action of ejectment within twenty years after the last payment of interest. The defendant relied upon the Statute of Limitations, and contended that it was not competent to the mortgagor, by paying interest, to confer upon the mortgagee a right which he did not himself possess. The Court sustained the claim of the mortgagee. Lord Campbell, C.J., thus states the principle upon which the judgment is founded:—"If the mortgagee receives regular payment of his interest under the mortgage, he never enquires, and he would not be allowed to enquire, whether rent is regularly paid by the tenants to the mortgagor." In other words, the receipt of interest from the person entitled to collect the rents is, of itself, sufficient to preserve the title of the mortgagee.

This case was cited before the House of Lords in the case of *Chinnery v. Evans*, already referred to, and fully justifies the argument *ab inconvenienti* upon which Lord Westbury relies. The whole tenor of the reasoning of the Court shows that the principle enunciated will be strictly confined to states of fact similar to those out of which it arose; that is to say, to cases where the person who pays the interest is the only person entitled to collect the rents, and where the mortgagee does not know and could not by the exercise of reasonable diligence ascertain that that person, by failing to collect the rents, had lost his estate.

The case of *Roddam v. Morley* (n) has been supposed to be adverse to these views. That was an action brought under the Statute of Fraudulent Devises, 3 & 4 W. & M. cap. 14, by a bond creditor against the heir and devisee of

(n) 1 DeG. & J. 1.

a testator jointly. Under the Common Law personal property only was subject to seizure under execution for the payment of debts. Afterwards a bond creditor was allowed to bring an action against the heir of the obligor. But when the right of devising lands was conceded, the heir, if sued upon the specialty debt of his ancestor, could plead *riens per descent*; for he could be made liable only in respect of descended estates. The effect, if not the intention, of the devise was consequently to defraud creditors of their rights. To remedy this injustice, the Statute of Fraudulent Devises was passed. If the creditor succeeded in proving his debt, the statute made the devise void. The estate of the devisee then became vested in the heir, in whose hands it was subject to seizure and sale by the sheriff. But the execution of a bond was never held to constitute, at Common Law, a lien upon the lands of the obligor. And it could not be contended that the death of the obligor could create such a lien. And that the bringing of the suit did not constitute a lien, is evident from the language of the Lord Chancellor in delivering judgment. "The debt in this case," says his Lordship, "is not payable out of the land." It appeared in evidence that the testator, who was indebted on a bond, had devised his real estate to A. for life, with remainder to B. in fee. A. entered into possession of the land, and paid interest on the bond for a period exceeding twenty years. He then ceased to make payments. An action having been brought against the heir and devisees under the statute, the devisees pleaded the Statute of Limitations in personal actions as a defence; for, as the claim of the creditor was not a lien on the land, the Statute of Limitations in real actions was not applicable. It was contended for the plaintiff that the devisee for life was a party liable to pay within the meaning of the statute, and that the legal effect of his payment was to preserve the claim of the creditor against all those who might at any time have been sued. The Court sustained the claim of the plaintiff. But the Statute of Fraudulent Devises is practically obsolete. Even if it were in force, a decision upon the joint effect of that statute and the Statute of

Limitations in personal actions could furnish no rule for the interpretation of the Statute of Limitations in real actions. But the most convincing evidence that the decision in that case furnishes no rule for the solution of the question under discussion, is the obvious injustice of exacting the whole debt from the devisees when, by the very principle upon which the statute is based, the recovery of judgment by the creditor deprives them of that estate in the land in respect of which alone their liability to pay the debt of another could be asserted. Even in England, however, the authority of this case has been shaken by the decision of Lord Chelmsford in *Coope v. Cresswell* (o). And Lord Westbury, in *Dickinson v. Teasdale* (p), has, in the most emphatic manner, distinguished it from those cases where the claim of the creditor constitutes a lien on the land. In this latter case it appeared that the owner in fee of two parcels of land devised one of them to A. and the other to B., and directed each of these devisees to pay one half of his debts. He also charged all his debts upon the devised estates; so that, although each of the devisees *inter se* was bound to pay one half of the debts, yet, *quoad* the creditors, there was a universal lien. One of the devisees paid interest on the debts for a period exceeding twenty years. The other neither paid interest, nor made any other admission. The creditors having filed a bill to realize their lien by the sale of the devised estates, that devisee who had made no admissions pleaded the Statute of Limitations. It was contended for the creditors that they had satisfied the statute by adducing evidence of payments of interest by a person who was liable to pay the debt; and that the legal effect of those payments extended to all the devised estates, upon the authority of the case of *Roddam v. Morley* (q). But Lord Westbury overruled the plea, saying, "That which is totally unreasonable in point of principle derives no support from *Roddam v. Morley*, a case which in its circumstances had not the remotest possible bearing on the present."

(o) L. R. 2 Chy. App. 112.

(p) 1 De G. J. & S. 52.

(q) *Supra*.

In the case of *Adnam v. The Earl of Sandrich* (r), it appeared that the owner of a parcel of land subject to a rent charge conveyed it to a purchaser who entered into possession. The purchaser and his heirs remained in possession for a period of seventy years without acknowledging the right of the owner of the rent. The grantor and his heirs paid the rent charge during all that time. The payments of rent having been then discontinued, the question arose for judicial determination whether those payments were sufficient to remove the bar of the Statute of Limitations. The Court, drawing such inferences of fact as could be drawn after so great a lapse of time, considered that the land had been sold for its full value as unencumbered property, and that the payments of rent must be referred to an agreement between the vendor and the vendee that the vendor and his heirs should continue to bear the burthen of the charge. They held that this agreement constituted an agency between the parties; and that this agency extended to those who succeeded to their estates. They arrived at the conclusion that the payments might thus, consistently with legal principles, be held to be made by the person in possession of the land subject to the charge, and that they were sufficient to remove the bar of the statute. The decision in this case may also be sustained upon the principles laid down in *Doe dem. Palmer v. Eyre* (s), that the statute has no application where the payments have been made by the person who created the charge, and where the person entitled to the charge does not know, and could not reasonably be held bound to ascertain, that the person making the payments has no interest in the land subject to the charge.

There are four possible cases, to one of which every instance of the removal of the bar of the statute by the payment of interest on a mortgage must be referred. First, it is sufficient that the mortgagee receives his interest. This view would seem to receive countenance from the dictum of Lord Cranworth in *Chinnery v. Evans*.

(r) L. R. 2 Q. B. D. 485.

(s) 17 Q. B. 366.

“ So long as the mortgagee regularly receives interest upon the mortgage, he cares nothing about the equity of redemption, a matter in which he has no concern.” But if it is sufficient for the mortgagee to receive interest, it is sufficient for a stranger to pay it—a proposition expressly repudiated by the Court. This view, then, must be rejected. Secondly, the payment must be made by a person liable *ex contractu* to pay the debt. This view, affirmed by Vice-Chancellor Stuart in *Bolding v. Lane* (*t*), was denied in the most emphatic manner by Lord Westbury on appeal from that decision (*u*). Thirdly, any payment will be sufficient where the amount received must go into the account in reduction of the mortgage debt. This doctrine, which was affirmed by Mr. Justice Fry in *Harlock v. Ashberry* (*v*), was denied to be law by the Court of Appeal on appeal from that decision. Fourthly, the payment must be made by a person whose liability to pay is derived from his interest in the land subject to the charge, and the legal effect of the payment must be limited to that interest. This rule is consistent with reason, is sustained by authority, and must be held to be a settled principle of the law of the land.

ST. JOHN, N. B.

THOMAS MILLIDGE.

(*t*) 3 Giff. 561.

(*u*) 1 De G. J. & S. 122.

(*v*) *Supra*.

EDITORIAL REVIEW.

Politics.

It has recently been attributed to this Journal that it is becoming a political journal, instead of being purely devoted to the interests of the profession. Like many political charges, it is vague, couched in no less general terms than those in which we have given it, and has not been substantiated by a particular reference to anything offensive printed in the pages of more than three volumes and a half.

Theoretically, there is no reason why a journal devoted to law should not occasionally discuss political questions, *i.e.*, questions touching the science of government, the constitutional powers of Parliament and the Legislatures, the subordination of these bodies to the judiciary as contrasted with the subordination of the English judiciary to the Imperial Parliament, and various other questions of greater or less importance. If such questions are shut out from discussion in the profession of the Law, where can they be more intelligently debated? Certainly not in the public newspapers. If left to party newspapers, efforts are made on each side, not so much to arrive at the positive truth, as to discover ingenious arguments which will sustain the party view, whether right or wrong. If questions of municipal law were as fiercely debated in the public newspapers as questions of constitutional law, no advocate's reputation could last any longer than his success. Experience tells us that no professional man could afford to be constantly lauded by the most influential newspaper in existence. For some day or other he must be found arguing on the wrong side, not from choice,

perhaps, but as a matter of duty. Matters affecting our constitution are of greater importance to the country than the private disputes of litigants, and, as a rule, involve more difficult questions for debate. Why, then, should they not be made the subject of study, discussion, and debate amongst members of our profession, and in a journal devoted to the interests of our profession?

With party politics this Journal has nothing to do, and has never, as far as the writer's recollection serves him, maintained the part of either side in politics in anything that has ever been printed in its pages. On the contrary, some of the most interesting public questions, involving pure questions of law, both constitutional and municipal, have been most studiously avoided, for the simple reason that they have been made the subject of party conflict. The *Streams and Rivers* case has never been touched upon in this Journal, though fruitful in points for discussion, except when we reprinted an article from the *Central Law Journal*, and when we referred to the judgment by the Judicial Committee giving leave to appeal, upon the meaning of the phrase "Laws of Canada." The Boundary question has never been alluded to. The Mercer escheat case was similarly treated until the final decision. These cases had been made party questions in the public newspapers; and the state of party feeling at present is such that a writer on one side or the other is always suspected of merely advocating a party view and not writing his conscientious opinion of the truth. For that reason, as we have said, such cases have been avoided, though forming legitimate matter for a journal devoted to the Law. We hope to see before long a more healthy public feeling. There are men amongst us who are mentally and morally incapacitated for pure party warfare. Their education and feelings must make them rise above it. The truth must be to them more sacred than a mere prejudice. As this field enlarges, so the scope of discussion will enlarge.

It may not be ingenuous to pass over without mention our articles on and references to *Regina v. Hodge*, and the McCarthy Act.

In treating of *Hodge's* case we did not debate at all the question that divided the political parties, but simply the doctrine of delegation of legislative functions, which did not enter at all into the public discussion.

The McCarthy Act was examined for the purpose of endeavouring to ascertain a subordinate point, and not with the view of sustaining its validity as against the provincial enactment on the same subject, a conflict of legislative action which still divides the parties.

When we indulge in party warfare or endeavour to maintain one party or the other on party grounds only, we will most justly deserve the animadversion of fair minded men. But so far, we sincerely believe that we have not transgressed in that respect, and that the exception taken to the conduct of this Journal is not a just one.

Bidding for Business.

It is not long since we published—free to the advertisers—a circular note of one of the Powers at Toronto, in which an offer was made to enter into treaties with sundry persons to whom the note was communicated, to protect and defend their rights and interests before the majesty of the law.

Evidence of activity in the Profession is furnished by the circulation of another such document, a true copy of which we are enabled to give below, together with a copy of the blank form for reply furnished *gratis* to intending subscribers.

“Walker & McLean, Barristers, &c.,

Elgin St., opp. Russell House.

W. H. Walker.

D. L. McLean.

Ottawa, 1st July, 1884.

“Dear Sirs:

By virtue of a new ruling of the Chief Justice of the Supreme and Exchequer Courts, all parties doing business with the Courts must do so through agents duly authorized in writing, which writing must be filed before registering of names in agency books.

Under these circumstances we take the liberty of sending you the enclosed blank authority, and shall be pleased if you will honor us by duly filling up, signing and returning same to us without delay.

We are, dear sirs, very truly yours,

WALKER & McLEAN.

.....1884.

“ Robert Cassels, Esq.,

Registrar Supreme and Exchequer Courts of Canada,
Ottawa.

Dear Sir:—This is to certify that Messrs. Walker & McLean, of the City of Ottawa, Barristers, &c., are duly authorized to act as agents in all causes and matters in the Supreme and Exchequer Courts of Canada.

Kindly enter their names as agents in the agency books, and oblige Yours truly,

.....”

Judicial Ignorance.

We do not intend to attribute ignorance to any member of the Bench. Far from it. But we contend that a learned man when he takes his seat on the Bench is not called upon to make himself judicially ignorant of the ordinary affairs of life.

In a judgment lately delivered by Mr. Justice Rose, which was printed in the newspapers, his Lordship is reported as having put the question, “Am I to take judicial notice that beating a drum is playing a drum?” His Lordship is further reported to have refused to do so, and in consequence, to have quashed a conviction for making a noise in the street by playing a drum. The question arose in the case, we believe, whether or not the playing of drums was an unusual noise.

His Lordship held it was not an unusual noise. If not, then it is one of the usual sights and sounds of our public streets. Must a judge shut his eyes to all that is going on about him and become absolutely ignorant of the commonest things when he ascends the Bench? We hope not. In *R. v. Woodward*, 1 Moo. C.C. 323, the judges unanimously took notice that *beans* were a species of *pulse*. In

R. v. Swatkins, 4 C. & P. 548, Patteson, J., after conferring with Bosanquet, J., took judicial notice that *barley* was *corn*. But in *R. v. Blaney*, R. & R. 416, the judges refused to take notice that a *colt* was of the *horse* species. We do not believe, however, that the modesty of the Bench would extend so far to-day.

One of our learned judges is an accomplished player upon the flute. Must he forget this on the Bench, and solemnly take evidence as to the manner in which the sound of a flute is produced when the occasion calls for it?

We hope Mr. Justice Rose was a little wrong on this point.

The Consolidation of the Statutes.

We have been favoured with a copy of the Report of the Commissioners appointed to revise and consolidate the Statutes of Canada. Without spending more time than circumstances will permit in testing the work we forbear to speak as to its quality.

With very few exceptions, the consolidation, as far as it has proceeded, comprises chiefly matters connected with the public service, and other matters which rarely come before the practitioner.

There is, however, printed with the Report a draft Bill to codify the law respecting indictable offences, which is taken chiefly from the English code, and which is recommended to Parliament. The whole code might with advantage be adopted. It is a matter of no little importance to us that the law of England should be identical with our own—where our circumstances permit—for we have the advantage of the English decisions upon it to guide us.

If the scheme of the Commissioners does not already include it, we would recommend the adoption in its entirety of the English Bills of Exchange Act. It forms an excellent code. Its introduction into some of the American States is, we believe, spoken of. The advantage of having a uniform code of laws respecting bills and notes for the whole English speaking world would be incalculable. The Act is partially in force in Manitoba, owing to its being

part of the law which was introduced by their Legislature. Any Act to be past in future will probably be a uniform law for the whole of Canada, and a better one than the English Act could not be devised for us.

A Hint on Advocacy.

To the uninitiated the neat little card which we copy below has a harmless appearance, and conveys no hint on its face of all that lies beneath.

"C. R. Irwin, M.A., barrister-at-law, &c. Successor to L. U. C. Titus, Esq. Special attention to all business. Notes and mortgages bought. Collections promptly attended to. Wills, deeds, mortgages and contracts drawn at moderate rates.

Money to loan; terms to suit. In all matters charges fair.

Mr. L. U. C. Titus will complete the business of his former clients, and remain in the office."

This document is being circulated, through the medium of a local newspaper, amongst the inhabitants of that portion of our fair Province which formerly paid tribute to a man, whose success in life was marred by a chain of circumstances, which linked him to the unhappy fate a short history of which may be read at page 182 of this volume. Considering his end, the learned gentleman whose name adorns the card which we reproduce is unkind to himself at least, when he proclaims himself a successor to that unhappy man.

The last clause of the card is suggestive, to say the least.

BOOK REVIEWS.

Sinclair's Division Court Law, 1884, embracing the Act of 1882-1884, and new Division Court Tariff. By J. S. SINCLAIR, Q. C., Judge of the County Court and Local Judge of the High Court of Justice at Hamilton. Hamilton: Times Printing Co., 1884.

The recent amendments of the Division Courts Act were the signal to Judge Sinclair for a general review of such Division Court Law as has been evolved since the publication of his larger work on the Act. Considering the average size of Division Court claims, one is astonished to see so many decisions of the Superior Courts affecting them, a collection of which makes a good sized volume.

In the first section of 49 Vict. cap. 9, which amends the Revised Statute respecting the attachment of wages, &c., the learned commentator makes several corrections of errors which have crept into the text, but leaves one uncorrected. The right to attach debts by this section is not to be impaired where the debt has been contracted for board or lodging and in the opinion of the Judge the exemption of \$25 is not necessary for the support and maintenance of the debtor's family. The phrase "actually necessary" is used by our author, but the word "actually" is not in the statute. It will make but little difference, possibly, in the construction of the clause, but the cases cited on the value or importance of the word "actually" lose their significance. The amendments upon interpleader issues, and new trials, as well as those already referred to, are very fully annotated under the headings (which, by the way, are not suggestive of orderly arrangement), "Notes of late Canadian Cases on Division Court Law," "Late Canadian Cases on Garnishment," and "Additional Cases on Division Court Law." Here are to be found all the latest cases that have been decided, and to these are added English, Irish, and selected

American cases on the attachment of debts. Counter-claims and relief against third parties are also treated of, and the book may be referred to with advantage for the solution of points in this intricate practice by practitioners in the High Court. The Judicature Act certainly does mention counter-claim in connection with Division Courts, but the third party practice is not specifically introduced into Division Court practice, and in the absence of something specific we should hesitate before acceding to the view that it has become a weapon of those Courts.

Naturalization and Nationality in Canada ; Expatriation and Repatriation of British Subjects ; Aliens, their disabilities and their privileges in Canada. The Naturalization Act, Canada, 1881, with notes, &c., with appendix containing Treaty, &c., also naturalization laws of the United States, with forms, &c. By ALFRED HOWELL, of Osgoode Hall, Barrister-at-Law, author of "Surrogate Courts Practice." Toronto and Edinburgh: Carswell & Co., 1884.

This subject was partially treated by Mr. Howell, 3 C. L. T. 463, 511, under the title "Expatriation." The subject is a comparatively new one in Canada, and is daily becoming one of more importance. Almost the whole of our unoccupied Territories must be peopled by immigrants, and we may assume that they will, like those already amongst us, come from almost all the nations on earth. These must all become naturalized if they desire to enjoy the full privileges of the country, and it therefore goes without saying that the Naturalization Acts must be deemed amongst the most important laws that affect the Northwest Territories. In addition to his annotation of the Naturalization Acts, Mr. Howell gives us a very readable essay on the old rule of perpetual allegiance, and as his remarks extend to the laws of the United Kingdom and the United States of America, his book should have a wide circulation.

A Law Treatise on the Constitutional Powers of Parliament, and of the Local Legislatures, under the British North America Act, 1867. By J. TRAVIS, Esquire, LL.B.; of the New Brunswick Bar; Annotator of Parsons on Partnership; First-Prize Law-Essayist of Harvard University of 1866; Author of Leading Law Editorials in the American Law Register (Phila.: 1866 and '67; Hon. Chief Justice Redfield, Author of "Law of Wills," Law of Railways," etc.; Editor) on Origin and History of the Common Law; Jurisdiction of the United States Federal Courts; Common Law Criminal Jurisdiction of the State Courts, etc., etc. St. John, N. B.: Printed by the Sun Publishing Co. 1884.

It is not often that the gravity of the law is disturbed by the writer of a ponderous treatise. But almost the first thing that strikes the eye in this treatise is a bit of levity which we reproduce, typography unaltered.

THE SMART BOY'S JOKE.

"How many legs has a horse?" he asked of his less brilliant companion.

'Four,' was the reply.

'Suppose you call its tail a leg, how many would it have?'

'Why five, to be sure!'

'No, it would'nt, you goose! *Calling its tail a leg, would'nt make it a leg, would it?'*"

This, however, furnishes the key to the whole essay.

Where do you find the law respecting the Powers of Parliament and of the Local Legislatures, Mr. Travis?

In the decisions of the Judges of our Canadian Courts, and of the Judicial Committee of the Privy Council.

Suppose you dub their judgments "Ridiculous Construction," Comedy of Errors," "Supremely Ridiculous," what would be the effect?

"They are not law." (See page 178 of the treatise).

No, Mr. Travis; because you say they are not law, that won't make them so, will it?

The Ontario Judicature Act, 1881, and Subsequent Rules of the Supreme Court of Judicature, and the High Court of Justice; with the Orders of the Court of Appeal, and other Acts, Orders, and Rules relating to the Practice in the Supreme Court of Judicature, with practical notes. By JAMES MACLENNAN, Esq., one of her Majesty's Counsel. Second Edition. By THOMAS LANGTON, M.A., LL.B., of Osgoode Hall, Barrister-at-Law. Toronto and Edinburgh: Carswell & Co. 1884.

Notwithstanding that but three years have elapsed since the first edition of this book, the present edition has not been published without a demand for it. Constant reference to the first edition has well attested its value as a book of practice, and this edition will well maintain the character already earned. Little can be said of an annotation, except that the notes are full or meagre—the value of the work depending almost entirely upon the diligence of the editor in collecting his cases; and, from an examination of some parts of the work before us, we may say that Mr. Langton has been as diligent as an annotator can well be. To the knowledge of the writer, the work of collecting and arranging the cases has been carried on by Mr. Langton for a great length of time, and the work of putting the results of his labour through the press has consumed a comparatively short space of time. The citations of cases range over all the publications, English and Canadian, in which anything bearing upon the practice can be found. Hence, we may rely upon Mr. Langton for the most various and most recent collection of cases on the Judicature Act and Rules that is accessible to the practitioner. The book will be acceptable to our friends in Nova Scotia, who are about to enjoy the luxury of a Judicature Act.

Mayne's Treatise on Damages. Fourth Edition. By JOHN D. MAYNE, of the Inner Temple, Esquire, Barrister-at-Law, and LUMLEY SMITH, of the Inner Temple, Esquire, one

of Her Majesty's Counsel, late Fellow of Trinity Hall, Cambridge. London: Stevens & Haynes. 1884.

This valuable work comes out smaller in bulk than the previous edition, a commendable feature in a law book at the present day. The learned authors have omitted from this edition much obsolete matter, as they say in their preface, and have re-written a portion and made additions. When a book has become a standard work, and a work of authority, as this book has, it would be superfluous for us to add to the praises which the profession has awarded to it by placing it in the front rank of law books.

REVIEW OF EXCHANGES.

Albany Law Journal.—10th May, 1884.

Liability of a Corporation Issuing a Certificate of Shares, by J. L. THORNDIKE. In a case of *Moore v. Citizens' Nat. Bank*, decided by the Supreme Court of the U. S. A., the facts were that the plaintiff lent to the defendants' cashier a sum of money on a certificate of the Bank showing that the cashier was entitled to a number of shares. The certificate had been left blank with the cashier, who fraudulently filled it up in the plaintiff's favour. It was held that the plaintiff was not entitled to recover damages against the Bank. This decision is criticised adversely. Compare *Erb v. G. W. R. Co.*, 5 S. C. R. 179; and *Robinson v. Memphis. &c., R. Co.*, referred to in 13 Cent. L. J. 361.

Ibid.—17th May, 1884.

Common Words and Phrases. Wilful, wanton; Business; Convenience; Assigned; Accident; Author, writing; Counting-house; Domestic animals; Oxen; are defined.

Ibid.—24th May, 1884.

Sureties on Official Bonds, by GUY C. H. CORLISS. "One principle," says the learned writer, "must be considered as settled beyond any possibility of doubt. It is this:—Where the nature of the office is not changed, the surety on an official bond of a public officer is not discharged from liability for the faithful discharge by the officer of the duties which were incumbent on him at the time of the execution of the bond, although other and different duties have been by law subsequently imposed upon him." Sureties are bound for the performance of new duties germane to the office created after the bond was given. But they will not be liable for new duties subsequently imposed, not germane to the office. Whether an extension of time for collection of moneys will discharge the sureties is unsettled. The weight of authority is in favour of the rule that, although the books and accounts are evidence against the surety to show that the principal had committed no defalcation prior to the period of the inception of the surety's liability, yet they do not conclusively establish that fact, and the contrary may be shown by evidence. A collector of public money, under bond to keep it safely, and pay it when required, is not bound to render the money at all events, but is excused from paying it over by the act of God or the King's enemies; his liability, and that of his sureties, in this respect is the same as that of a carrier at common law.

Ibid.—31st May, 1884.

The Presumption of Death, by JOHN D. LAWSON. Rule 5. An absentee shown not to have been heard of for seven years by persons who

if he had been alive would naturally have heard of him, is presumed to have been alive until the expiry of such seven years, and to have died at the end of that term.

Domicile of Married Woman—Validity of Foreign Divorce, by HUGH WEIGHTMAN. An able review of the cases on the question, leading up to the recent case of *Harvey v. Farnie*.

Ibid.—14th June, 1884.

The Presumption of Death, by JOHN D. LAWSON. Rule 6. An absentee within Rule 5 is one who has left his residence, home or domicile either temporarily (intending to return) or permanently (intending to establish a fixed residence, house or domicile, elsewhere). Where the removal is temporary, absence alone, without being heard of, is sufficient to raise the presumption of death within Rule 5. But where it is permanent, without intention to return, the presumption does not arise until inquiry has been made at the fixed residence, house or domicile. 7. "Persons who would naturally have heard of him" within rule 5 is not confined to a particular class; they may be relatives or strangers. 8. "Not heard of," within rule 5, means that none of the persons referred to in rule 7 has heard anything about him which should or would raise a reasonable doubt in his or her mind that he really was no more. 9. The absentee's residence, home or domicile, within rule 6, refers to that place which he first departed from, and does not include places where he may have afterwards resided or visited.

Ibid.—21st June, 1884.

Incorporation of extrinsic Documents in Wills, by EUGENE D. HAWKINS. "An extraneous paper, which by reason of informalities in its execution is inadmissible as a will, can be incorporated into a validly executed will, so as to make it, *ipso facto*, a part of the will itself, provided three facts concur. First. That the will refers to some paper. Second. That it refers to it, actually in existence at the time the will was executed. Third. That the specific extraneous paper sought to be incorporated has been proved by satisfactory and conclusive evidence to be the selfsame paper which the testator by his words of reference designed to indicate."

The Presumption of Death, by JOHN D. LAWSON, continued in the following number. Rule 10. But the presumption will arise that the death of the absentee has occurred before the expiration of the seven years from being last heard of, where any of the following circumstances are shown, viz.: 11. That within that time he was in a desperate state of health. 12. That within that time he embarked on a vessel which has not since been heard of and is long overdue, inquiries having been made at her ports of departure and destination. 13. That at some time within that period he has encountered a "specific peril", which includes not the ordinary dangers of travel or navigation, but some unusual or extraordinary danger. 14. That his habits, character, domestic relations or necessities would have made it certain that if alive within that period he would have returned to or communicated with his residence, home or domicile. 15. But the presumption of death at the expiration of seven years from being last heard of does not

arise where it is improbable that the absentee, even if alive, would or could have been heard of, or could have communicated with his residence, home or domicile, or where in other judicial proceedings the absentee is recorded as having been alive subsequently to the end of seven years.

American Law Register.—March, 1884.

Demurrage, by THEODORE M. ETTING. "Demurrage was formerly supposed to include all claims in the nature of delay or detention which were capable of being ascertained and paid for, either at a rate agreed on, or by an amount calculated at so much per ton, or by damages to be subsequently estimated and arrived at. Modern English cases have, however, dealt with demurrage on a different footing, by drawing a hard and fast line between cases originating in the breach of an express contract and actions for damages for detention in the nature of demurrage resulting from the breach of the contract implied by law." The American cases make no distinction, but award it for all delays. A number of phrases used in charter parties are construed, and many English and American cases are cited.

Ibid.—April, 1884.

Drunkenness as an Excuse for Crime, by JOHN D. LAWSON. English and American authorities agree that drunkenness is no excuse for crime. Early cases held it to be an aggravation of the offence, but later American cases have held that to be erroneous. There are exceptions to the rule which the learned writer discusses at length. "Where the habit of intoxication, though voluntary, has been so long continued as to produce disease which has so destroyed the mental faculties of the accused as to render him insane—make him unable to distinguish between the right and wrong of the act he does—he is as much excusable as though his insanity was the result of an involuntary disease." Where the crime of murder is by statute divided into degrees, the higher degree requiring proof of deliberation and premeditation, evidence of intoxication is admissible on the question whether the act was committed with deliberation or premeditation or both. "On the question whether a person in committing an act has done so with the intent requisite to constitute it a crime, evidence of intoxication is held relevant." English and American cases sustain this view. In Ohio it has been held that on an indictment for passing a counterfeit bill, the drunkenness of the accused at the time was relevant. As to threats, it may be a question whether the words have been uttered with a deliberate purpose, or are merely low and idle expressions. Where the accused has been provoked, his drunkenness may be taken into account because, in that state, he would be more easily excited than when sober. So, where self defence is set up, the jury may take into consideration the fact of drunkenness, in order to determine whether the accused was acting under a *bona fide* apprehension that his person was about to be attacked. Last, a person who has been made drunk by the fraud or artifice of another, would not be punishable for a crime committed while in that state, if his condition was such as to render him not criminally liable had his mental state been caused by disease.

Ibid.—May, 1884.

Liability of Telegraph Companies for Fraud, Accident, Delay and Mistakes in the Transmission and Delivery of Messages, by BENJAMIN F. REX. Concluded in the following number. Where a telegraph company fails to comply with a contract to transmit and deliver a message sent at the expense, and for the sole benefit of the sender, the sender, and he only, can maintain an action on the contract, or he may sue on the case. Where, however, the contract with the company is made for the benefit of the person to whom the telegram is sent, either by his agent or a stranger, he is regarded as the real party to the contract, and can maintain an action upon it. Where the price of transmission has been charged to him, or the message has been sent c. o. d., the sender will be presumed to have acted as his agent in contracting with the company. Cases of mistakes leading to the shipment of merchandise not ordered, or causing the purchase of merchandise, are cited, showing the responsibility of the companies for damages. Where an opportunity to attach for a debt was lost, and the debt was also, in consequence, lost through delay in delivering the message, the company was held liable for the debt. Where the plaintiff telegraphed to send him coal oil belonging to him, and the company failed to transmit the message, they were held not liable for loss of profits, but liable for an increase in the price of freight, and all expenses occasioned. But where a message is an order to buy or sell, or an acceptance of an offer to sell, and profits are lost through the company's negligence, they may be recovered. On breach of a contract to transmit an obscure message, the measure of damages is the price paid for transmission. Vindictive damages have been given for misconduct in delivering messages out of their regular order so as to injure a man in his business. Telegraph companies cannot limit their liability to the amount paid for transmission or any nominal sum, for gross negligence, fraud, or misconduct either by regulation or conditions in contracts. It is against public policy to permit telegraph companies to exempt themselves from liability for any failure to use that degree of care and skill which their business calls for. Cases where regulations have been held valid, etc., are cited. Where a message is so altered through the negligence of the company as to make it unintelligible, the person to whom it is sent should have it repeated before attempting to act upon it, and if he fails to do so and suffers loss by acting upon it, the company is not liable.

American Law Review.—November-December, 1883.

Of the Enforcement of Debts contracted and Liabilities Incurred by Receivers of Railroads, by GEORGE W. MCCARY. The purpose of the article is to consider the nature and extent of the receiver's liability, how far the property of the corporation in his hands is liable for debts and claims upon contracts entered into, and debts and liabilities incurred by him while engaged in operating a railroad, and the manner in which such debts and claims may be enforced. The allowance of a wider discretion to a receiver of a railroad in the performance of his difficult duties than to other receivers, arising from the impossibility of his acting always under specific orders of the Court, is pointed out,²⁵

well as the protection thrown around him by the Court when acting in good faith. Proceedings against property in his hands are proceedings *in rem*, and the test of liability is stated to be found in the answer to the question, "Is the debt or claim against the receiver of such a character as to be enforceable against the fund or property in his hands?" General rules which govern the enforcement of claims against receivers are given.

Constructive Notice, Its Nature and Limitations, by WILLIAM L. SCOTT. An exhaustive and valuable contribution, citing a large number of English and American cases. The doctrine of the leading case of *Kennedy v. Green*, that notice is not to be imputed where the agent is perpetrating a fraud upon his principal, is treated at length and shown to be much shaken by more recent decisions. It appears that in some of the United States, as in Ontario, the length to which certain technical doctrines on this subject have been pushed in England are not favoured by the Courts. In our Courts *Rykert v. Miller* and *Driffl v. Goodwin* indicate no wish to advance in this direction.

Burden of Proof in Criminal Prosecutions, by EMLIN McCLAIN. Presumptions of law, whether conclusive or rebuttable, do not change the burden of proof; they simply determine the amount and character of proof necessary to sustain the issue by that party upon whom the burden rests. It is not accurate to say that the burden of proof under any circumstances shifts, unless in regard to particular facts bearing upon the issue which either party may seek to establish, or the preponderance or weight of evidence at different stages of the case. Burden of proof must not be confused with weight of evidence. The pleas to the indictment available at Common Law are discussed. The conflict of authority, both as to which party has the burden of proof, and as to the amount of proof required where the defendant seeks to establish an *alibi*, appears almost irreconcilable, but the generally accepted rule is that the burden of proving the defendant's participation in the crime is upon the prosecution, and that if the defendant introduces evidence tending to prove an *alibi*, the prosecution, in order to be entitled to a conviction, must overcome such evidence and establish his participation beyond a reasonable doubt. The burden of proof where insanity is a defence, and the different rules with reference to it in England and the States of the American Union are considered, and the hope expressed that the decisions will become more uniform as the broad principles governing the subject are more widely recognized. The cases cited are very numerous.

Ibid.—January-February, 1884.

Abuses of the Writ of Habeas Corpus, by SEYMOUR D. THOMPSON. The abuses complained of consist, in part, in the unwarranted application of the writ by certain of the Courts in the United States to cases never contemplated by the original statutes, which is said to have resulted more than once in a grave conflict of jurisdiction between the Federal and State Courts; but more especially in the assumption by the district Courts (which are inferior Federal tribunals), through an unauthorized employment of this remedy, of what in reality amounts to a revisory

or *quasi* appellate jurisdiction over the acts of the highest State Courts. It has sometimes happened that the inferior Federal Court has discharged, on *habeas corpus*, prisoners held under order of the Supreme Court of the State. The subject is well handled, but its scope is not so far enlarged as to treat of the abuses (if such exist) of this writ by Courts outside the United States.

Domiloe as affecting Marriage and Divorce, by HUGH WRIGHT-MAN. The unsatisfactory state of the law of marriage and divorce where questions arise between husband and wife of different nationalities, and in other cases, is commented upon, and international congressional action advocated. It is claimed that within the United States, where each and every State enjoys the right of legislation on this subject, nothing short of an amendment to the Federal Constitution can meet the necessities of the case. This is to be desired as much in the interest of the United States as in that of foreign judicatures. *Haggard v. Haggard*, a late case heard before the P. & D. Division in England, is commented upon, as well as prior English cases, and the opinions entertained in English and American Courts upon this subject are given. *Fisk v. Stevens* (Legal News, Vol. VI. p. 329), is noted, with the suggestion that the case is to be carried to the Supreme Court of Canada and will probably be finally determined by the Privy Council.

Preferred Stock, by LEONARD A. JONES. "It is clear that a corporation already organized cannot, after issuing authorized stock, create preferred stock, except by virtue of authority conferred by its charter or by-laws, unless it be done with the consent of all the shareholders whose rights would be affected thereby."

Peculiarities of Manx Law, by ROGER FOSTER.

The First Ten Years of the Institute of International Law. A translation of the report of M. Alphonse Rivier, Secretary-General of the Institute of International Law, at its annual meeting, in September last, at Munich. It is a *résumé* of ten years' labours of the Institute, which announces its aim to be to ascertain the judicial opinion of the civilized world, "and to give to that opinion an expression clear enough and exact enough to be accepted by the different governments as a rule for their relations with each other. The Institute would thus prepare, by a gradual process, a codification of International Law, which is called for at this time with so much stress. Some of our members have already attempted this, in works which have been published, and which are generally known and often cited as authority." The bill of fare here presented should satisfy the most ambitious desires of the forty-seven gentlemen who compose the Institute. It is believed that their work is important and fruitful of promise of a time when international disputes may be settled by a recourse to law and not to arms.

Review of Causes in Courts of Last Resort, by SAMUEL MAXWELL. No fault can be found with the wisdom of the practical suggestions in this article in regard to the preparation and presentment of cases before Appellate Courts, though many hints would seem almost superfluous.

Thus, to advise the attorney to take his case himself, but "if he find it necessary, let him call in additional counsel," is a waste of breath. If the attorney requires such advice, by all means, in the interest of his client, let him lose no time in calling in the additional counsel."

Ibid.—March-April, 1884.

The Effect of Withholding, Suppressing and Manufacturing Evidence in Civil Causes, by JOHN D. LAWSON. The extent of the decisions in cases falling under the maxim *Omnia præsumuntur contra spoliatores* is considered, and numerous cases in which evidence within the power of a party has been withheld, or manufactured evidence tendered, commented upon. The presumption does not arise where the evidence is unattainable, where it is legally withheld, or where the withholding is not proved. The presumption arising from the non-production of evidence within the power of the party does not relieve the opposite side altogether from the burden of proving his case. Mere non-production, in the absence of evidence of spoliation or equivalent suppression, raises no presumption to the discredit of the party. A valuable contribution.

The Post-Office Department as a Common Carrier and Bank, by TEMPLE BODLEY. Mr. Bodley claims that Congress has exceeded its constitutional powers in passing a statute to permit the transmission of seeds, tobacco, samples and other merchandise through the mails. A power to establish "post-offices and post roads" cannot, he says, extend to enable the Government to enter upon the express and forwarding business. He further attacks the money-order system as likewise unconstitutional, and regrets the apathy with which the country at large appears to acquiesce in the stealthy encroachment by the politicians upon these promising fields for the cultivation of patronage. At a time when a telegraph strike, or the discovery of a railway pool, never fails to set well-meaning but not over wise people clamouring for the purchase and operation by the Government of all the railways and telegraph lines in the country, an article like this is pleasant reading. Perhaps a paternal despotism is, after all, the form of government best suited to most people.

Courts of Chancery in America—Colonial Period, by SOLON D. WILSON. An interesting article treating the subject from an historical standpoint.

Payments for Corporate Shares in Property instead of Money, by LEONARD A. JONES. "Unless prohibited by statute, a corporation may issue fully paid up shares for property needed for the purpose of its operations, and, in the absence of fraud, the transaction is binding upon the parties; that is, it is binding between the corporation and the original takers of the stock. The latter cannot be called upon by the corporation, or its assignee, or any creditor, to make further payments upon such stock."

Judgment Liens in the Federal Courts, by WARREN WATSON.

THE CANADIAN LAW TIMES.

OCCASIONAL NOTES.

ONTARIO.

High Court of Justice.

CHANCERY DIVISION.

[PATTERSON, J.A., OCTOBER, 1883.]

FISHER v. SPOHN.

Execution against lands—Equity of redemption—Taking new mortgage in lieu of existing mortgage—Effect of statutory discharge—Priority.

In 1881 Smith purchased certain lands from D. and mortgaged them to Fisher, who thereupon advanced money to pay the purchase money and to pay off a mortgage on the lands to Britton, which was however not yet due. On payment a statutory discharge was executed and registered. In January, 1882, two executions against Smith's lands were placed in the sheriff's hands; the second of which was at the suit of Spohn, the defendant in this action. In April, 1882, Smith sold the lands to House, and in order to substitute House for Smith as mortgagor, Fisher took a mortgage from House and discharged that which he held from Smith. In June, 1883, the sheriff sold the lands, and Spohn, the defendant, bought them with notice of the facts.

Held, that Fisher had not lost his priority as mortgagee over the executions by taking the mortgage from House in lieu of that from Smith.

The facts appear in the judgment.

Ermatinger, for the plaintiff.

Macdougall, Q.C., for defendant Spohn.

Donahue, for defendant House.

PATTERSON, J.A.—The defendant Spohn purchased at sheriff's sale, in June, 1883, under two writs of *venditioni exponas* against the lands of defendant Smith in one of which Spohn himself was the execution plaintiff, half an acre of land in the town of Dunwich, on which was an hotel.

The writs of *fi. fa.* were delivered to the sheriff to be executed in January, 1882. The plaintiff had a mortgage upon the land, made by Smith to him in January, 1881, for \$1,000 which was the full value of the property. This mortgage was long prior to the writs, which therefore only bound Smith's equity of redemption, and that was of little or no value. But in April, 1882, Smith sold the property to the defendant House, who paid \$300 cash and gave a mortgage to the plaintiff for \$850, which mortgage, together with something over \$200 of the money which House paid, the plaintiff accepted in satisfaction of Smith's mortgage of 1881, and he executed a statutory discharge of that mortgage, which was duly registered. This was done in ignorance of the fact that the executions against Smith were in the hands of the sheriff; which ignorance was due simply to the plaintiff's neglect to inquire at the sheriff's office. On the pleadings it is charged that Smith misled the plaintiff by representing that no executions were there, but the evidence proves no such thing. The farthest it goes is in a statement made by the plaintiff to the effect that, when a search in the Registry office was spoken of, Smith remarked that his title was the same as when he gave the mortgage; but no one seems to have thought of the necessity of searching in the sheriff's office, and Smith swears that he was not himself aware of the executions until he saw the advertisement of the lands for sale, which was not until May, 1883.

The plaintiff brings this action under the apprehension that, by discharging Smith's mortgage, he had given priority to the executions; and he asks to have the discharge cancelled as given under a mistake. He asks also for relief of an entirely different kind, in case the discharge remains in force. I shall in the first place dispose of this alternative prayer.

The \$1,000 mortgage made by Smith in January, 1881, was for money then lent him by the plaintiff, to enable him to buy the tavern stand from one DeCow. He bought the place for \$1,050; and, as part of the purchase money, he paid off a mortgage for \$800, which DeCow had given to one Britton. No release of that mortgage was executed, and the plaintiff, when he discovered the blunder he had made in releasing Smith's mortgage, sought to protect himself by getting in the legal estate in the land; and accordingly he obtained from Britton, on 20th January, 1882, an assignment of the DeCow mortgage, which had been paid a year before. His alternative prayer is to have that mortgage declared an existing security for its amount.

The answer to this claim is quite conclusive. It is that no release or re-conveyance from Britton was necessary, because he was paid off before anything had fallen due for either principal or interest, and when, therefore, there had been no default; and so the mortgage became void under the terms of the defeasance clause.

At the sheriff's sale, the plaintiff's solicitor warned all who were there that the plaintiff would insist upon both of the mortgages, that is to say, the DeCow mortgage and the Smith mortgage. In doing this, the plaintiff assumed the risk of making good his contention; because if he should fail to do so, after by his warning he had depreciated the property offered for sale, he could scarcely hope to attack the sale successfully on the score of inadequacy of price.

When the property was first offered for sale under the writs of *fi. fa.*, the highest bid for Smith's interest was \$30. The sheriff therefore returned, "lands in hand for want of buyers." Under the writs of *venditioni exponas*, it was sold to defendant Spohn for \$55, and on 30th June, 1883, the sheriff executed a conveyance to him in pursuance of that sale.

If the land was subject to the mortgage for \$1,000, the amount of \$55 was probably a full price for the equity of redemption.

We are not told anything of what competition there was at the sale; but in the fact that the sale to House by Smith was for \$100 more than the mortgage of Smith to the plaintiff, we have some evidence, beyond mere estimates, of what the place was thought to be worth.

The defendant Spohn seemed, from his evidence, to have supposed that the price of \$55 had been fixed in some way by reference to the amount of the sheriff's charges; and that he, having the second of two executions had to buy for his own protection, and would have to account to the prior execution creditor for his claim. I understood that, however, to be on the assumption that the plaintiff was postponed to the executions; and I did not understand Spohn to say that he had any express agreement to that effect. On the part of the sheriff the sale was a direct sale of Smith's interest and equity of redemption for \$55, which sum was paid to him as the purchase money and not as the amount of his fees and expenses. Those charges were in fact only about \$25, and he paid over the other \$30 to the solicitor who happened to represent both execution plaintiffs.

I am of opinion that if the effect of the conveyances of April, 1882, was to give priority to the executions, the plaintiff would be entitled to the relief he asks.

All that was intended was to substitute House as the plaintiff's mortgagor instead of Smith. There was no intention to vest in Smith any beneficial interest, or interest of any kind in the property, upon which the writs of *fi. fa.* could attach. If Smith had acquired other property during the currency of the writs, they would no doubt have bound that property; but if by mistake, property had been conveyed to Smith, which was intended for another, the execution creditor would have no equity to object to the mistake being corrected. This was essentially the position of these transactions, if we regard Spohn as merely an execution creditor. In that character he would occupy no different position from the plaintiff in the other execution; and if relief were sought against him in that character, the other execution plaintiff ought also to be before the Court. But Spohn is brought in as purchaser at the sheriff's sale, and the circumstance of his being plaintiff in one of the executions is an accident only so far as the character in which he appeared is concerned, but it is of importance in connection with the evidence of the *bona fides* or *mala fides* of his purchase.

It is not denied by Spohn that his reason for directing the sheriff to advertise and sell under the writs, was the discovery that the discharge of Smith's mortgage to Fisher had been registered, and the idea he deduced from that circumstance that there might be something to be made under the writs. It is reasonably certain, also, that he knew, or had reason to know, the real nature of the transaction between Smith, House and Fisher,

because he tells us himself that he thought it was a careless trick of the solicitor to discharge the mortgage.

But besides this knowledge which he had when merely execution creditor, there was express notice to him, and all other intending purchasers on the occasion of the attempt to sell under the *fi. fas.* and again at the sale under the writs of *ven. ex.*, and his purchase, as evidenced by the sheriff's deed, as well as by the small sum bid, was not meant as a purchase of the land. His own statement, indistinct as it was, of his notion that by the purchase he satisfied his own execution and became liable to pay off the prior one, shows that he did not suppose he was buying the fee of the land for the \$55; while the form of the sale, as evidenced by the sheriff's deed and the testimony of the deputy sheriff respecting the application of the \$55, negatives the correctness of his idea, as he attempts to explain it, but is consistent with the understanding that he was buying only the equity of redemption.

Whatever right a stranger might have had who bought the land in good faith at the sale, I think it is clear that the defendant Spohn did not strengthen his position by his purchase; but that as against him the plaintiff is entitled to the relief he asks, if that is necessary for his protection. The principle acted upon in *Howes v. Lee*, 17 Gr. 459, to which Mr. Ermatinger referred me, is applicable to this case.

If the Smith mortgage remains in force, the plaintiff will, of course, hold it as trustee for House, to the extent of the money paid upon it out of House's \$300.

But I am further of opinion that the point made by Mr. Donahue on behalf of House, that the discharge of Smith's mortgage had not the effect, apprehended by the plaintiff, of letting in the executions, was well taken.

The transactions between Smith, House and the plaintiff, having taken place all on the same day, were necessarily, or in the absence of evidence to the contrary, will be assumed to have been in the order following:—First, the conveyance from Smith to House; second, the mortgage from House to the plaintiff; third, the discharge by the plaintiff of his mortgage.

Therefore, before the plaintiff discharged his mortgage, Smith had parted with all his estate in the land. He had a perfect legal right to do so, notwithstanding the *fi. fas.*, but his vendee took subject to the liability, created by those writs, to have the equity of redemption which he purchased sold to satisfy the judgments.

Then came the statutory discharge of the mortgage, which under R. S. O. cap. 3, sec. 67, was to be valid and effectual in law as a release of such mortgage, and as a conveyance to the mortgagor, his heirs, executors, administrators, or assigns, or any person lawfully claiming by, through or under him or them, of the original estate of the mortgagor. The reconveyance was, therefore, to House, and not to Smith. Smith's interest was not enlarged, for he had parted with all his interest.

Mr. Macdougall combated this conclusion by arguing that as Smith's interest was bound by the writs, and passed to House, subject to be dealt with in the same way as if he had not conveyed it, the release operated

just as it would have done if the conveyance had not been made. At least I so understood the argument. I think the answer to it is given by remembering what is meant by the interest which was bound. It was simply the value of the land over and above the incumbrance. That was what the executions attached upon, and that was all that could be followed into the hands of House.

Another objection to the operation of the discharge, was taken by Mr. Ermatinger upon the ground that the plaintiff's mortgage was not paid, but merely exchanged for this one made by House, as authority for which he referred to *Dilke v. Douglas*, 5 App. R. 63. That case, however, does not touch the point, as it turned on the right of an executor who has not received the mortgage money to discharge a mortgage of freehold lands, under his statutory powers. There can be no question of the power of a mortgagee to take satisfaction in any form, either by the substitution of another security, or otherwise, and to discharge his mortgage by the execution and registration of the certificate prescribed by the Registry Act.

In my opinion the plaintiff is entitled to a declaration that the property passed to the defendant Spohn by the sheriff's deed, charged with the amount which, immediately before the conveyance from Smith to House, was due upon the mortgage from Smith to the plaintiff, and with subsequent interest thereon.

I do not see any good reason why the plaintiff should not have his costs against the defendant Spohn, who has insisted that under the sheriff's deed he took the land freed from the incumbrance.

IN CHAMBERS.

FRIEDRICK v. FRIEDRICK.

Solicitor—Settlement of action by parties—Fraud on solicitor—Solicitor's rights and remedy.

A settlement of an alimony action, after judgment for permanent alimony upon which writs of execution were placed in the sheriff's hands, was effected between the parties without the intervention of the solicitors on the record. To carry out the settlement a third solicitor was instructed to withdraw the writs from the sheriff's hands, which he did without paying the costs of the plaintiff's solicitor. There was no collusion or actual fraud against the plaintiff's solicitor proved.

Held, that the plaintiff's solicitor had control of the writs in the sheriff's hands to the extent of his unpaid taxable costs, and that he was entitled to have the writs replaced, or new writs placed, in the sheriff's hands at the expense of the solicitor who withdrew them and the plaintiff, or to an order directly against the defendant for payment of his unpaid taxable costs, and for the costs of the motion against the plaintiff and the solicitor who withdrew the writs.

In this action orders had been obtained for interim alimony against the defendant, and judgment recovered for permanent alimony with costs of action, whereupon writs of execution were placed in the sheriff's hands against the goods and lands of the defendant. The lands of the defendant

were standing in the name of a trustee for him at the time the writs were delivered to the sheriff, and so remained. The plaintiff and defendant, in the month of June, 1884, effected a settlement of their differences without consulting their solicitors, and thenceforward lived, or agreed to live together, and to effectuate the settlement the plaintiff wrote a letter to Mr. Mahon, a solicitor, instructing him to withdraw the writs from the sheriff's hands, as the action had been settled. Both Mr. Mahon and the sheriff were aware that the plaintiff's solicitor had not been paid his costs. Mr. Mahon made an offer of a sum in full of costs to the plaintiff's solicitor, which he refused to accept. He then withdrew the writs from the sheriff's hands. The plaintiff's solicitor then made this application against Mr. Mahon, the defendant, and the sheriff, for an order for payment by some or one of them of his costs taxable against the defendant, and unpaid, or that the writs might be replaced in the sheriff's hands, or that new writs similarly endorsed might be issued at their expense and placed in the sheriff's hands, and for the costs of the motion.

E. Douglas Armour, for the plaintiff's solicitor. The settlement was in fraud of the solicitor's rights, for he controls the writs while his costs are unpaid, and has a property in the writs to the extent of his unpaid costs: *Ex parte Games*, 3 H. & C. 294. [*Ferguson, J.* The costs are given to indemnify the plaintiff. Do they not belong to her?] The plaintiff is not entitled to indemnity until she has paid her solicitor. Before payment the solicitor has a lien. The plaintiff cannot discharge that lien. It is not necessary to show collusion against the solicitor or an actual attempt to defraud him. If the result is to deprive him of his costs or the means of obtaining them, that is sufficient. *Morgan v. Holland*, 7 P. R. 74; *Hall v. Griffith*, 4 C. L. T. 192. The defendant in an alimony action is always under a certain direct liability to the plaintiff's solicitor, whose right cannot be taken away by a settlement with the plaintiff personally. See *Leonard v. Leonard*, 9 P. R. 450; *Moore v. Moore*, 4 C. L. T. 404; and *McPhatter v. Blue*, 15 C. L. J. N. S. 162, is an authority for the liability of the solicitor who aided the settlement in derogation of the applicant's rights.

Creelman, for the defendant. A settlement of an alimony suit is not one from which collusion can be inferred, as in other cases. There must be collusion. *Welsh v. Hole*, Doug. 238; *Francis v. Webb*, 7 C. B. 731; *Jones v. Bonner*, 2 Ex. 230. The relief asked is purely in the discretion of the Judge: *Re Fairbairn*, 3 Chy. Cham. 71. The money represents the work of the plaintiff's solicitor. There were no fruits or benefits recovered in this action. There has been no money fund or property recovered from the defendant.

O'Sullivan, for Mr. Mahon and the sheriff. There cannot have been collusion, for the plaintiff has got nothing by the settlement, and collusion is necessary to entitle the applicant to succeed. *Sullivan v. Pearson*, L. R. 4 Q. B. D. 153; *Cross v. Cross*, 43 L. T. N. S. 533.

FERGUSON, J., 12TH AUGUST, 1884.—At the argument it was stated that no reliance was placed by the applicant (the plaintiff's solicitor) upon an agreement between him and the plaintiff respecting the interim alimony and other matters. The original agreement could not be found, and no

copy was used or put in. It was admitted that no fraud or collusion was shown (directly by the evidence) in respect of the settlement made between the plaintiff and the defendant. The case then is simply this, an alimony suit had been brought and there were writs of execution against the defendant for interim alimony and costs of the plaintiff, in the hands of the sheriff to be executed. The plaintiff and defendant then met and agreed to settle their differences and live and co-habit together again, and the plaintiff gave instructions to another solicitor to have these writs of execution withdrawn, which was done, and this application is then made by the plaintiff's solicitor on the record for the relief that he asks, viz., to have the writs replaced in the hands of the sheriff, or other writs similarly endorsed placed in his hands, or an order against the defendant or the sheriff, or the solicitor who withdrew the writs, for the payment of the plaintiff's costs to her solicitor and costs of this motion.

The settlement of a suit of this character, in the way stated, by an agreement between the parties to co-habit together again, is one that is favoured by the Court as being in accordance with public policy, and is not a fact from which, I think collusion could be inferred without proof. The plaintiff got nothing by the settlement. Counsel for the applicant contended that he should succeed even in the absence of fraud or collusion. The property against which it was said that the writs of execution could be made available was certain land said to have been in the hands of a trustee for the defendant. It was admitted that another suit would be necessary for the purpose of realizing out of these lands, and that the execution did not directly attach upon the alleged equitable interest of the defendant. The applicant had been paid by the plaintiff between \$300 and \$400, but it was alleged that \$200 of this sum was on an account other than the costs of this action.

The subject is one of some nicety, as appears by the views of many of the learned judges. The older authorities seem to indicate that the absence of collusion should be fatal here. The later cases, however, do not appear to support such a contention. Here the plaintiff recovered a judgment by and through the exertions of the applicant, her solicitor. It was said that the writs of execution were not issued upon this judgment for permanent alimony, but upon orders for the payment of interim alimony and costs. Such orders have, however, the effect of judgments. The applicant had, I think, a lien upon them and the judgment for permanent alimony to the extent of his unpaid costs of the action, and he had as a consequence, I think, the right of control to the same extent of the writs in the sheriff's hands. The withdrawal of the writs without any reference to him or his claim, was, I think, an act in violation of his rights whether there was or was not collusion in fact, and I am of the opinion that the applicant is entitled to an order against the plaintiff and her solicitor who, under his instructions withdrew the writs for the delivery of the writs to him (the applicant) to be replaced in the hands of the sheriff for execution, or if the writs have been lost or destroyed, then for the issue by the applicant of duplicate writs to be endorsed as were the original writs, and delivered to the sheriff to be executed, and in such case an order upon the plaintiff and the solicitor who withdrew the writs

to pay him the costs of such duplicate writs. The applicant is, according to some of the cases entitled to an order against the defendant to pay him the amount of his unpaid costs. This order he may have if he desires it but I suppose the judgment, executions and lien will be considered preferable.

I do not see my way to making the order asking for the payment by the solicitor who withdrew the writs, or the sheriff, of the unpaid costs of the applicant. It is not, I think, necessary to decide now anything respecting their liability or that of either of them, or whether or not there is any such liability in respect of the act done and complained of in the nature of damages. What was done against the right of the applicant was the withdrawal of the writs. It rather appears from what passed on the argument that to realize out of the equitable interest aforesaid, was the sole expectation of the applicant in respect of these writs. Confessedly another suit was necessary to do this. In such a suit the applicant might fail and I cannot say what, if any, value the writs in the hand of the sheriff were to him. The case is, I think, not at all like the cases where a sum of money equal to or greater than the unpaid costs passed through the hands of the solicitor or the sheriff. The order above granted may go but this relief cannot, I think, under the circumstances be awarded.

As to the costs, I think the applicant entitled to his costs of this application against the plaintiff and the solicitor who withdrew the writs, and I think the same parties should pay the sheriff's costs.

Division Court, Wentworth.

GAGE v. PINKERTON.

Increased jurisdiction—Reduction of debt below \$100—Place of trial.

A promissory note for more than \$100 was made in the County of Bruce, payable at a bank in the City of Hamilton, and before suit the amount due on the note was reduced below \$100 by payment.

Held, that the Division Court at Hamilton, having originally had jurisdiction to try the case under the 8th section of the Division Courts Act, 1880, still had jurisdiction, notwithstanding the reduction in amount.

The facts are stated in the head note.

SINCLAIR, Co. J. The first question which is raised on behalf of the defendant is that this Court has no jurisdiction to entertain or try this case. It is contended that the 8th section of the Division Courts Act, 1880, has no application to a case of this kind; that the Court would have had jurisdiction if the full amount of the note had been sued for, but, by reason of the payment of part of the principal money, and the balance being under \$100, the special jurisdiction conferred by that section does

not apply. The words are, "Where the debt or money payable exceeds one hundred dollars, and is made payable by the contract of the parties at any place named therein, the action may be brought thereon in the Court holden for the division in which such place of payment is situate." I am of opinion that the original amount of the contract and the place of payment are what regulate the jurisdiction in this case. The note being for an amount exceeding \$100 and under \$200, and made payable at a place within this division, not only the right to sue for the full amount of the note, but for any part of it, is conferred on this Court. I do not propose to analyse the grammatical construction of the section in question (though in doing so the same opinion must be arrived at), but taking the ordinary scope of the clause, the language which the Legislature has employed, and the reasonableness of the view urged on behalf of the plaintiff, all bring one's mind irresistibly to the conclusion that jurisdiction exists. In *Maxwell on Statutes*, at page 166, it is said that, "in determining either what was the general object of the Legislature, or the meaning of its language in any particular passage, it is obvious that the intention which appears to be most agreeable to convenience, reason and justice, should in all cases open to doubt be presumed to be the true one." At page 171 of the same work, it will be observed that any construction which produces an anomaly is to be avoided. So here, I think, I should incline strongly against that view which would give this Court the right to entertain this action if the balance should be a fraction over \$100, while the right would not exist if the balance were a fraction under that sum. What reason is there for such a construction? And is not reason all the other way? The Legislature evidently intended to get over the difficulty occasioned in such cases as this, where the note is made at one place payable at another, and where the Court at the latter place would not have jurisdiction from that fact alone, the whole cause of action not arising at the place where the breach of contract is committed. It clearly was the intention to give a new jurisdiction in cases suable in the Division Court under the increased jurisdiction conferred by the Act of 1880, where the parties had thought proper to make the money payable at a particular place. That jurisdiction could not, in my humble judgment, be taken away by a reduction of the debt to less than \$100. It attached to the contract from its very nature and inception and did not depend upon what might subsequently be paid on it. Any other construction of the Act would in my view be too narrow and restricted, and without reason for its support. Why, in all cases in the Division Court, a plaintiff should not be allowed to sue a defendant at a place which the latter has designated as the place where he wishes to discharge his liability, I cannot see. That, however, is for the Legislature.

I will be very glad if the defendant here should raise the question of jurisdiction in this case on motion for prohibition, but the view I have expressed I must adopt.

NEW BRUNSWICK.

In the Supreme Court.

FORD v. REID.

[JUNE, 1883.]

Practice—Postea—Stay—Judge's order for postea.

Where a *postea* had been stayed, and the cause entered on the paper by the defendant to move for a new trial, on being reached, was allowed by the Court to stand over, no counsel appearing for the plaintiff,

Held, that the plaintiff's attorney had no right afterwards, without a judge's order, to obtain the *postea* from the clerk and sign judgment on the verdict.

PARLEE v. SNIDER.

Practice—Consent verdict—Power of Court to vary consent.

A verdict was entered for the plaintiff at *Nisi Prius*, pursuant to an agreement that the verdict should be entered for the defendant if the Court should be of opinion that the plaintiff had failed to make out a case.

Held, (Weldon and Wetmore, JJ., dissenting), that the Court had no power to enter a nonsuit.

MORAN v. TAYLOR.

Practice—Commission to examine witnesses—Interrogatories not returned with depositions—Nonsuit—Discharging jury.

A commission issued to examine witnesses abroad upon interrogatories, and *viva voce*, but was returned without the interrogatories, in consequence of which the Judge on the trial refused to allow either the depositions or the *viva voce* examinations of the witnesses to be read, and the plaintiff was nonsuited.

Held, Per Allen, C.J., Weldon, Palmer, King and Fraser, JJ., that the evidence was properly rejected, but as the omission to return the interrogatories was not the fault of the plaintiff, a new trial should be granted on payment of costs.

Per Wetmore, J. It was not clear that the *viva voce* examination could not have been read; therefore *quære* whether the plaintiff ought to pay costs.

Quære, whether a Judge has power to discharge the jury from giving a verdict in such a case, without the defendant's consent.

[AUGUST, 1883.]

Doe dem. WOOD v. DE FORREST.*Intestacy—Descent—Death of intestate after 6th April, 1853—Mother, uncles and aunts surviving.*

If a person dies intestate, and without children, between the 6th April, 1856, and the date of the passing of the Cons. Stat., leaving a mother, and uncle and aunts surviving him, his mother is entitled as his heir-at-law under Cons. Stat. cap. 78 to the real estate of which he died seised.

BELYEA v. MERRITT.

New trial—Balance of testimony—Refusal to interfere with verdict.

Where the evidence is such that the jury might have found for either party, the Court will not interfere with their verdict unless there is some substantial objection either to the admission of evidence or to the Judge's charge—these being the only grounds taken for a new trial.

Ex parte MOORE ; *In re* LONG.*Absconding debtor—Warrant to attach property—Affidavit stating belief of witnesses only—Supersedeas—Certiorari—Delay in applying.*

A warrant to attach the property of a person as an absconding debtor, issued under Cons. Stat. cap. 44, upon the affidavit of the creditor, in the statutory form, and the affidavits of two other persons stating their belief of the absconding or concealment of the debtor, but not alleging any facts to prove it.

Held, per Allen, C. J., Weldon and Wetmore, JJ., (Palmer and King, JJ., dissenting) (i). That such an affidavit was not a verification of the absconding or concealment as required by the Act, and that the Judge had no authority to issue the warrant. (ii). That the proceedings, being void, were not cured by the appointment of Trustees, and registry thereof under the 11th section of the Act. (iii). That a purchaser of land from the debtor after the issue of the warrant had a right to apply for a *certiorari* to quash the proceeding. (iv). That such application might be made though two terms had elapsed since the warrant issued.

Held, per Palmer and King, JJ. (i). That if the affidavit were insufficient to prove the absconding, the adjudication was good till it was set aside, which could only be done on the application of the debtor under section 12. (ii) That if a *certiorari* would lie on the application of a third party, it ought not to be granted unless it was shown that the debtor was not absent or concealed when the warrant issued. (iii). That even though the affidavits were insufficient to prove the absconding, the appointment of the Trustees was conclusive proof, under section 11, of the regularity of all the previous proceedings.

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SOME POINTS IN THE LAW OF ARBITRATION.

IT is always interesting to consider any question concerning the law of arbitration, since so many disputes are now settled on a reference, and it has become customary, especially in mercantile contracts, to insert an agreement to refer all questions which may arise to arbitration.

The recent decision of *Fraser v. Ehrensperger* (a) has settled an important point under the English Common Law Procedure Act of 1854, viz., that where an agreement to refer does not contain a clause that the submission is to be made a rule of Court, the appointment of an arbitrator by one party to the agreement is revocable by either party before the award is made.

It is proposed, first, to examine the effect of this decision so far as our Common Law Procedure Act is concerned, and then to consider under what circumstances an action will be stayed under the same Act (sec. 214), where the instrument under which the action is brought contains an agreement to refer existing or future differences, and lastly, to touch on the decisions respecting articles of partnership and insurance policies. First, to consider *Fraser v. Ehrensperger*. The parties to that action had made a contract by which they agreed to refer certain disputes to the arbitration of two London brokers and an umpire. A dispute arose within the meaning of the contract, and Messrs. Fraser & Co. appointed an arbitrator and notified Messrs. Ehrensperger & Eckenstein, who imme-

(a) L. R. 12 Q. B. D. 310.

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diately revoked the appointment, and advised Messrs. Fraser & Co. and the arbitrator to that effect. The latter, nevertheless, proceeded and made an award. An application having been made to enforce it, however, it was held by Mr. Justice Mathew, and affirmed in the Court of Appeal, following the decision in *Re Rouse & Meier* (b), that as the agreement did not contain any stipulation to make the submission a rule of Court, the right of revocation existed, and the award could not be enforced.

The case turned on the effect of section 13 of the English Common Law Procedure Act of 1854, which is the same as sec. 216 of R.S.O. cap. 50, and makes the award of a single arbitrator appointed by either party on notice and default to appoint another binding, and gives such arbitrator power to proceed as sole referee.

At Common Law a submission to arbitration is revocable. An arbitrator, when appointed by either party, is the mandatory or agent of both, by virtue of the original agreement to arbitrate, and as such is liable to have his authority revoked by the person appointing him or his opponent.

The distinction between general agreements to refer and submissions to arbitration, must be borne in mind. The former are contracts of the parties not capable of revocation; the latter, in the nature of mere appointments of agents whose authority so derived could always be terminated (c).

The first enactment narrowing this power of revocation was 9 & 10 Wm. III. cap. 15, which provided that submissions to refer by merchants and others could be made rules of Court, and thereafter were irrevocable. The Statute 3 & 4 Wm. IV. cap. 42, still in force in England, enacts, that the authority of any arbitrator appointed in pursuance of a rule of Court, or of any submission to reference, should not be revocable, if the submission contained an agreement that it should be made a rule of Court.

(b) L. R. 6 C. P. 212.

(c) *Piercy v. Young*, L. R. 14 Ch. D. at p. 203; *Re Rouse & Meier*, *Supra*, at p. 217.

The English Common Law Procedure Act does not extend the operation of this statute (*d*).

The provisions of R. S. O. cap. 50 concerning arbitrations are still in force, notwithstanding the Judicature Act (*e*).

The sections of R. S. O. cap. 50 relating to arbitrations are taken from the English Acts referred to. Compare sections 201, 202 and 203 with sec. 17 of the English C. L. P. Act of 1854; sec. 214 with sec. 11 of the Act of 1854; sec. 215 with sec. 12 of the same Act; sec. 216 with sec. 13; and sec. 204 with 3 & 4 Wm. IV. cap. 42, sec. 39; and the only important difference will be found to exist in sec. 204. The 3 & 4 Wm. IV. cap. 42, sec. 39, refers to submissions when the parties have agreed to make the award a rule of Court. Sec. 204 applies to submissions "*not containing words purporting that the parties intended that such agreement should not be made a rule of Court.*" The appointment under this section cannot be revoked.

Had the contract in *Fraser v. Ehrensperger* contained an agreement to make the submission a rule of Court, under 3 & 4 Wm. IV. cap. 42, sec. 39, the appointment of the arbitrator would have been irrevocable; and it seems clear, from a comparison of the statutes, that as it stood the agreement would have been binding in this Province, and that the case does not apply here. The dicta in *Wood v. Closter* (*f*), and *Township of York v. Willson* (*g*), are strong expressions, though not actual decisions on the point.

It is not unusual to find in contracts containing arbitration clauses, an agreement that the decision shall be final and binding, and *that there shall be no appeal therefrom*.

It is possible that words attempting to deprive a party of his right of appeal may be construed to be words

(*d*) *Fraser v. Ehrensperger*, *Supra*, at p. 313.

(*e*) *Cruikshank v. The Floating Swimming Bath Co.*, L. R. 1 C. P. D. 260.

(*f*) 16 U. C. R. at p. 490.

(*g*) 8 P. R. at p. 317.

"purporting that the parties intended that such agreement should not be made a rule of Court." If this be so, the case of *Fraser v. Ehrensperger* would apply to such agreements.

Parties cannot contract to oust the jurisdiction of the Court (*h*).

In *Wadsworth v. Smith* (*i*), the plaintiff was to build four houses for the defendant, whose architects were to certify as to progress, and if there was unnecessary delay or unsatisfactory conduct on the part of the plaintiff with regard to the erection of the buildings or any matter connected therewith ("the fact of such delay or unsatisfactory conduct to be ascertained and decided in writing by the architects, from whose decision there shall be no appeal"), then it should be lawful for the defendant to employ other persons to erect the houses, etc. On an application to make this agreement a rule of Court under section 17, C. L. P. Act, 1854 (R. S. O. cap. 50, secs. 201, 202 and 203), it was held that, assuming the agreement to be "an agreement or submission to arbitration" within the section, the clause that there was to be no appeal against the decision of the architects amounted to "words purporting that the parties intended that it should not be made a rule of Court." Cockburn, C.J., at p. 337, says, "Moreover, even if this were a submission within section 17, I think it could not be made a rule of Court, because it is clear that the parties intended that the matter should be left to the decision of the architects without appeal, but to make it a rule of Court would be to submit the decision to the jurisdiction of this Court."

Secondly. The next point for consideration is—Under what circumstances will an action be stayed under R. S. O. cap. 50, sec. 214?

Where there cannot be any defence to an action the proceedings will not be stayed, though the parties may have agreed to refer any question which may arise (*j*).

(*h*) *Scott v. Avery*, 5 H. L. C. 811.

(*i*) L. R. 6 Q. B. 332.

(*j*) *Lury v. Pearson*, 1 C. B. N. S. 639.

Lury v. Pearson was an action on a charter party by which the charterers were to insure the vessel and deliver the policies to the owners; the parties agreeing that "any question or difficulty which might hereafter arise out of that charter party should be decided by arbitration."

An action having been brought by the owners against the charterers for refusing to deliver the policies, against which there was no defence, the Court was satisfied that there was sufficient reason why the matters should not be referred (R. S. O. cap. 50, sec. 214), and refused to stay the action.

Where there was an admitted amount due and a right to set off unliquidated damages, the Court made an order staying proceedings in the somewhat similar case of *Russell v. Pellegrini (k)*. This was also an action on a charter party. Monthly hire was fixed. The charterers claimed damages on an implied warranty of seaworthiness. The contract provided that "should any differences of opinion arise between the parties to this contract, either in principle or detail, the same should be referred." Each party commenced an action, and the charterer then moved to stay the shipowners' action, and the Court made an order staying both, and referring all matters in dispute between the parties. As unliquidated damages were sought, and these could not be the subject of a set-off, the Court seemed more willing to make the order.

Where an allegation of fraud is made, the Court will consider it.

In *Wallis v. Hirsch (l)*, where a *bona fide* suggestion of fraud was made, the Court would not enforce an agreement to refer.

Where an order had been made referring a case under the C. L. P. Act, 1854, sec. 3 (R. S. O. cap. 50, sec. 189), the Court refused to set aside the order, on the ground that some item of the account might involve a charge of fraud (m).

(k) 6 E. & B. 1020.

(l) 1 C. B. N. S. 316.

(m) *Imhoff v. Sutton*, L. R. 2 C. P. 406; *Birmingham Gas Co. v. Ratcliffe*, L. R. 6 Ex. 224.

In *White v. Kirby* (n), the Secretary made an order staying proceedings, although fraud was alleged in the bill, and an account, an injunction and a receiver were asked for, as substantial justice could be done by arbitration.

The late Master of the Rolls laid down a rule in *Russell v. Russell* (o), which may thus be summarized:—In a case where fraud is charged, the Court will in general refuse to send the dispute to arbitration, if the party charged with fraud desires a public inquiry. But where the objection to arbitration is by the party charging the fraud, the Court will not necessarily accede to it, and will never do so unless a *prima facie* case of fraud is proved. This is the latest decision on this point.

The Court will examine and decide the question of whether the matters in dispute are within the agreement for arbitration, and on a motion to stay proceedings it is a good answer that the action is not brought concerning a dispute arising under the agreement (p).

The wording of the agreement to refer may be so broad that an action will be stayed and the matter referred, although the only question is one of law on the construction of the instrument (q).

Thirdly. To touch on the decisions affecting arbitration clauses in articles of partnership.

Each member of a partnership is the agent of the others to the extent only that he may bind them to perform or adhere to any contract or agreement into which he has entered, where it is within the scope of the business for the carrying on of which they are associated. As partnerships are never formed for the propagation of arbitrations, such proceedings are not within the scope of a partnership business, and one partner cannot, by virtue of his agency, without their knowledge and assent, bind his co-partners (though he may bind himself) (r), by executing an agreement to

(n) 2 Chy. Cham. 414.

(o) L. R. 14 Ch. D. 471.

(p) *Piercy v. Young*, L. R. 14 Ch. D. 200.

(q) *Randegger v. Holmes*, L. R. 1 C. P. 679.

(r) *Shongfurd v. Green*, 2 Mod. 228.

refer, or a submission to arbitration (s). All that is necessary to empower such partner is some evidence of authority conferred, parol, written, or under seal, it matters not which (t).

If three agree to arbitrate, and two only sign the submission, the third refusing to carry out the agreement, the two are not bound even as between themselves.

The consideration for each signing was the agreement of the other two; that agreement not having been adhered to, there is no consideration, and all are released (u). An arbitrator may take the accounts between the partners, he may direct that one partner shall receive all the assets and discharge all the liabilities of the firm, or that each shall receive a portion and discharge part of the debts. He may, though he is not bound so to do, direct a dissolution, if it is one of the matters referred. Where arbitrators have power to dissolve the partnership and, in order to adjust, the dissolution of it is necessary, they may award on disputes with respect to the partnership which have arisen subsequent to the date of the submission (v). If this were not so, they could never wind up the affairs of a firm unless business were to cease on the signing of the submission. This would be impossible in some, and undesirable in other cases. Nor has an arbitrator power to appoint a receiver unless authorized by the submission so to do (w).

If there is such a provision, then the proper way is for the arbitrator to direct the partners to join in giving the appointee a power of attorney to collect the debts, pay the liabilities, and so on. The submission, when it contains power to appoint a receiver, should embrace a clause exonerating the arbitrator from liability for any default of the receiver; otherwise, it is said (x) he may be held respon-

(s) *Baby v. Davenport*, 3 U. C. R. 54.

(t) *Russel on Awards*, 5th Ed. p. 19.

(u) *Russel on Awards*, 5th Ed. p. 19. and cases cited.

(v) *Thirkell v. Strachan*, 4 U. C. R. 136.

(w) *Russel*, 5th Ed. p. 407.

(x) *Lingwood v. Eade*, 2 Atk. 501.

sible for any deficiency were the person deputed to become insolvent.

By section 214, R.S.O. cap. 50, where parties to any instrument agree that existing or future differences between them shall be referred to arbitration, the Court or a Judge may stay the proceedings in an action commenced in violation of such agreement, after appearance and before plea, upon being satisfied that no sufficient reason exists why such matters should not be referred, and that the defendant always was ready and willing to refer, etc.

This clause is particularly applicable to partnership matters, and is constantly invoked by defendants. It was held (y) only to apply where the original agreement or contracts concerning which trouble had arisen, contained a proviso for a reference of disputes. So that where the partnership deed did not contain such a clause, but the parties, after differences had arisen, entered into a written agreement, it was considered not within the statute; but this case has been over-ruled (z). The section under consideration is not mandatory, but allows the Court to exercise its discretion. In one case (a) where the plaintiff asked for a stay of proceedings in an arbitration, V.-C. Bacon held that the jurisdiction not having been ousted by the articles of partnership, the Court having full and ample possession of the quarrel was bound to pronounce a decision, and in the meantime the proceedings of the defendant in the arbitration must be restrained. Taking this case by itself, one would imagine that the Court had no choice, but must exercise its jurisdiction when called on, if the case were properly brought. However, V.-C. Bacon took occasion in a subsequent case (b) to elucidate this very misty reasoning, where he says, "As far as I recollect it," (*Witt v. Corcoran*) "there had been a quarrel between the partners; one of them chose to say the partnership was dissolved, and was advertising that fact extensively; the other partner, who denied that there had been any such

(y) *Blyth v. Lafour*, 1 E. & E. 435.

(z) *Randell v. Thompson*, L. R. 1 Q. B. D. 748.

(a) *Witt v. Corcoran*, L. R. 8 Chy. 476.

(b) *Plews v. Baker*, L. R. 16 Eq. 571.

dissolution, and who felt that his trade was being injured and his property affected by the conduct of the defendant, filed his bill to restrain the publication and circulation of those advertisements, and thereupon the defendant bethought him that by giving notice of arbitration he would stop the proceedings in that cause. He tried it, and in my judgment failed, and I restrained him from making in that suit an unjust use of the Common Law Procedure Act, against his partner." From the explanation, rather than from the meagre report of the case itself, we may see that the Judge did not stay the arbitration because he felt bound when the facts of the case were fully before him to exercise his jurisdiction and adjudicate on the matters in dispute, but simply exercised the discretion given him by section 214, and where he found that there was nothing to submit, but the stay of the action was sought only for the purpose of delaying and hindering the plaintiff in his effort to avoid ruin and obtain justice, he allowed the action to proceed and stopped the arbitration.

In *Plews v. Baker*, the defendant denied that the partnership had been dissolved, and had before action told his partners he would submit the validity of the notice of dissolution to arbitration according to the articles. The plaintiffs however filed their bill for an account and a receiver, but on motion of the defendant, who appeared to be actuated only by a desire to carry out the agreement and fairly test the matters in dispute, ordered a stay of the proceedings, except in so far as they asked for a receiver, who was appointed. The inability of an arbitrator to grant an injunction is not reason sufficient for refusing a stay of proceedings, as the Court may, on the finding of the arbitrators that such would be proper, grant an injunction on application; but if circumstances are brought to the knowledge of the Court demonstrating a necessity for at once granting an injunction, that would be an extremely good reason for not sending the matter to arbitration.

The burthen of proving that an arbitrator cannot give effectual relief lies on the party instituting a suit (c).

(c) *Cooke v. Catchpole*, 34 L. J. Ch. 60.

It seems that an executor may leave himself open to have an award made against him personally, and not in his representative capacity, where he signs a submission of all matters in difference between himself and the other parties, in reference to the business carried on between his testator and the other parties to the submission, wherein he is merely *described* as an executor of the deceased partner (d).

The danger of conferring very general powers on arbitrators, and of not limiting the subject matter to be referred, may be well illustrated by the case of *Crouse v. Parke* (e).

The parties to the action were physicians, who had entered into a partnership to extend over four years. The defendant agreed that should they dissolve at the end of that time he would not take another partner, but would allow the plaintiff to enjoy all the practice of the firm to which he could not personally attend. Disputes arising, they referred them to arbitration, and both signed a submission, which provided that thereafter the partnership should be null and void. The plaintiff claimed damages for the prospective loss he might suffer by the defendant becoming released from his covenant to confine himself to the practice to which he could personally attend, and the arbitrator awarded him £1000. Though they considered the damages fanciful, and though extremely loth to allow the amount awarded, nevertheless the Court felt bound to hold that under the submission it was within the arbitrator's power, and confirmed the award.

Lastly. To glance at the decisions on arbitration clauses in Policies of Insurance.

Among the statutory conditions annexed to Policies in force in Ontario (f) is Condition No. 16, which provides for an arbitration under the provisions of the Common Law Procedure Act in case of any difference arising as to the value of the property insured, the property saved, or the loss. Prior to the passing of this Act many Insurance

(d) *Mulligan v. Wright*, 16 U. C. R. 408.

(e) 6 U. C. R. 362.

(f) R. S. O. cap. 162, sec. 3.

Companies issued their policies containing a condition somewhat similar, that differences arising touching losses under the policies should be submitted to arbitration ; and then the question arose, did the parties to the policy agree thereby to refer such differences within the meaning of the R. S. O. cap. 50, sec. 214, so as to entitle one party to stay an action brought on the policy. The question was answered in the case of *McInnes v. Western Assurance Company* (g), which was affirmed on appeal (h). There, on a condition in the policy reserving to the Company the power of leaving the loss or damage submitted to the judgment of arbitrators, it was held on a motion to stay proceedings in an action brought on the policy that the case was one within the contemplation of the statute. It was urged that the plaintiff, not having executed the policy, was not a party to the instrument, but the Court said that he became a party by accepting the policy. It was also argued that the condition provided for a valuation merely, and not for an arbitration ; but effect was not given to this contention. A mere valuation or ascertainment of a *quantum* of compensation is not the subject of a reference within the sections of the Common Law Procedure Act relating to arbitrations. The distinction between a valuation and an arbitration is therefore important. Where there is no difference between the parties, but an agreement to accept a sum to be fixed by a third person, it is merely a valuation ; for a valuation precludes the idea of there being any difference ; it prevents differences, but does not settle any which have arisen. But where there is an actual dispute as to the amount due by one party to the other, and they agree to refer the question, or where having so agreed a dispute arises and in ascertaining the amount of compensation the matter assumes the nature of a judicial inquiry, in which evidence is taken, and a decision arrived at thereon, then it is an arbitration.

Two cases illustrating the definition of a valuation are *Collins v. Collins* (i) and *Bos v. Helsham* (j).

(g) 5 P. R. 242.

(h) 30 U. C. R. 580.

(i) 26 Beav. 306.

(j) L. R. 2 Ex. 72.

In the former the parties entered into a contract to purchase a brewery and plant, at a price to be fixed by arbitrators, who were to choose an umpire before entering on a valuation. The arbitrators could not agree on an umpire, and on an application to appoint an umpire under the Common Law Procedure Act, 1854, sec. 12 (R.S.O. cap. 50, sec. 215), it was held that the case did not come within the statute.

Every case must be governed by the particular circumstances under which it arises. "Fixing the price of property may be an arbitration," but if, no dispute having arisen as to the sum to be paid, one party says to the other that he will take whatever A. may consider fair, and this proposal is accepted, this would be a valuation. A. may have such a knowledge of the property that each party is willing to abide by his appraisalment, and no referee appointed by the Court could occupy the same position between the parties. *Bos v. Helsham* was an action in which the defendants had sold to the plaintiffs certain premises. The particulars of sale stated the rental to be £30 per annum, and one of the conditions of sale was that if any error appeared in the particulars such error should not annul the sale, but compensation should be given, to be settled by two referees, one to be appointed by either party, or an umpire. After the conveyance had been executed an error in the rental stated was discovered. The plaintiffs then proceeded under the provisions of the Common Law Procedure Act, 1854, appointed a referee, and notified the defendants; and on their failure to appoint for seven clear days, the plaintiffs, acting under the Common Law Procedure Act, sec. 13 (R.S.O. cap. 50, sec. 216) appointed their referee sole arbitrator. He proceeded and made his award; but in an action brought to enforce the same it was held that the reference indicated by the conditions of sale, being one of quantum of compensation, was not a reference of "an existing or future difference," and that therefore the statute did not apply. Kelly, C.B., at page 79 says, "The principle amounts to this, that to make an arbitration within the Act, there must be an actual dif-

ference between the parties ; and where the contract assumes and provides for no difference, and where probably there is no difference in fact, the case is not one of arbitration."

Illustrating the meaning of an arbitration is the case of *Re Hopper's Arbitration* (k), which was a motion to enforce an award made under the following circumstances. A lease of a farm stipulated that in the event of a sale of the premises during the term, the tenant, upon notice, was to deliver up possession, and in such case each party should appoint a valuer to estimate the compensation to be given to the tenant for quitting. The premises having been sold, the amount of compensation to be paid was by deed between the parties submitted to the award of A. and B. and an umpire.

It was held that the reference was not merely to ascertain the amount of compensation or value to be paid the tenant, in the nature of an appraisalment, but was an arbitration within the Common Law Procedure Act ; and while recognizing the principle laid down in *Collins v. Collins* and *Bos v. Helsham*, Cockburn, C.J. (p. 373), said that these cases must not be taken to comprehend every case of compensation or value. As where, in ascertaining the value of the property or amount of compensation to be paid, the matter assumes the character of a judicial inquiry, to be conducted upon the ordinary principles upon which judicial inquiries are conducted by hearing the parties and the evidence of their witnesses. If it be the intention of the parties that their respective cases shall be heard and a decision arrived at upon the evidence which they have adduced before the arbitrator, it would be taking too narrow a view of the subject to say that because the object to be arrived at was the ascertaining of the value of property or the amount of compensation to be paid, the matter was not properly to be considered as one of arbitration.

Apart from any consideration of the effect of the statutory condition, a condition in an insurance policy of the

(k) L. R. 2 Q. B. 367.

nature referred to in *McInnes v. Western Assurance Co.* is an agreement to refer future differences, since disputes between the parties are contemplated, and the inquiry is of a judicial nature.

The question decided in the case last referred to was whether the case was within the statute at all. No circumstances were shewn which would render it unreasonable in the discretion of the Court to stay the action of the insured under sec. 214.

In the exercise of such discretion the Court may allow an action brought on a policy to proceed. And where a company refused to admit its liability on the policy, and sought to stay the action, the Court refused to interfere (*l*). And this is certainly very equitable, as otherwise all the expense of an arbitration might be incurred, and then the company would be at liberty to prove that no liability whatever existed, by showing that the building had been burnt by the insured, or by taking advantage of some one of the numerous conditions as to furnishing proofs, etc.

Now to be successful on a motion to stay an action the Insurance Company must virtually say, "We are satisfied that there is an honest loss; we will not shelter ourselves behind any technical condition; we merely want to know how much we should fairly pay."

HAMILTON.

E. E. KITTSON.

GEO. LYNCH-STAUTON.

(*l*) *Hughes v. London Assurance Co.*, 4 Ont. R. 293.

EDITORIAL REVIEW.

Judicial Ignorance.

When we published a few remarks concerning judicial ignorance, we had neither intention to give offence, nor idea that they could be misconstrued. To judicially ignore what is known to be a fact, is not to be unlearned, though some gentlemen would seem to think otherwise. It is hardly worth labouring that point.

We owe an apology to Mr. Justice Rose, however, for having written that, *in consequence* of his not judicially knowing that beating a drum was playing a drum, he quashed the conviction. In order to show his Lordship's reasoning, we quote below a portion of the judgment. The by-law under which the conviction was had was as follows : "No person shall, in any of the streets, or in the market-place of the City of London, blow any horn, ring any bell, beat any drum, play any flute, pipe, or other musical instrument, or shout, make, or assist in making, any unusual noise, or noise calculated to disturb the inhabitants." The beating of drums is not provided for by the statute authorizing the by-law. "Had it been," his Lordship says, "it would be difficult to argue, that the municipality would not have power to pass a by-law for the prohibition of the beating of drums, even though not a nuisance. As beating of drums is not mentioned, it must be either unusual or calculated to disturb in order to warrant it being prevented by by-law * * I am therefore of the opinion that the conviction and commitment disclose no offence; that the by-law, so far as it seeks to prohibit the beating of drums simply, without evidence of the noise being unusual or calculated to disturb, is *ultra vires* and invalid, and that as evidence must be given, it must also be received on the

prisoner's behalf. The evidence does not, so far as it goes, show that the noise is unusual ; it is the other way. * * The evidence does not state that there was a beating of drums. It is "playing a drum." Am I judicially to know that beating a drum and playing a drum are the same? The order must go for the prisoner's discharge."

We hope we have done the learned Judge ample justice by correcting our statement and former understanding of the turning point of the judgment ; but we hope we do him no less justice by believing that, if the case had depended upon his judicially knowing how a drum is played, he would have judicially known it.

Dalhousie Law School.

We have received the inaugural addresses delivered at the opening of the Law School in connection with the Dalhousie University of Halifax, N. S. The principal address was delivered by the Hon. A. G. Archibald, Q.C., C.M.G., and, in addition to a great deal of good advice as to the course of study and requirements of gentlemen preparing for the Bar, he makes such excellent remarks upon the chivalrous spirit that should actuate them, that we cannot forbear quoting them.

"Beyond and above all things, a lawyer should cultivate a high sense of personal honour—next to that, he should feel to be dear to him, the honour of his profession. He should thus, first for his own sake, secondly for theirs, shrink from any act or proceeding, either as attorney or in the higher sphere of barrister, which could compromise or sully his own reputation, and through it, that of the profession. He is not engaged in a trade. It is the lowest view of his profession to consider it as a business to make money by. There is no more despicable creature on the face of the earth than the lawyer whose whole soul is absorbed in bills of costs—who uses the opportunities his profession affords for no higher purpose than to exact fees—to mulct somebody—no matter whether client or antagonist—in bills of costs. Some acts done by lawyers through

tricks and quirks of the law, (far be it from me to say that any Nova Scotia lawyer has ever done the like,) whereby they succeed in robbing an innocent man of his money, deserve to be placed on a par with acts of piracy. The men who do these things may be in—but they cannot be of—the profession. Still it is by such men as these that a noble profession is degraded. It is the fact that men of the kind exist in some countries, that accounts for, if it does not justify, such sneers as that of Addison, when he tells the anecdote of a king sending to a neighbouring prince for 30,000 swine, and receiving a reply that the swine could not be spared, but he had 30,000 lawyers who were quite at his service.”

Mr. R. C. Weldon, Dean of the Faculty of Law, and Professor of Constitutional and International Law, delivered the other address, which, though different in style, is no less excellent than that of Mr. Archibald's.

British Columbia Reports.

We are very much pleased at receiving the first number of Volume two of the British Columbia Law Reports.

It appears that this volume, the first actually in course of publication, contains reports of current cases. Volume one, which is in course of preparation, is to contain earlier cases of importance not heretofore published.

These reports are edited by Mr. P. Æ. Irving, who was not very long since called to the Bar at Osgoode Hall.

The whole appearance of the number before us is very creditable, though the page might with advantage have been made smaller. We might also suggest that the reporter, instead of printing the judgment as written, with the preamble that “the facts sufficiently appear in the judgment,” should sever the statement of facts from the Judge's opinion, and print the latter alone as the judgment. The reporter's statement of facts is always accepted as correct, unless bearing evident error on its face, and nothing is gained in that respect by making it appear as a judicial statement of facts. The arrangement we suggest produces a more artistic report.

Mr. Justice O'Connor.

The vacancy created by the elevation of Mr. Justice Cameron to be Chief Justice of the Common Pleas has been filled after a long and irksome delay by the appointment of the Honourable John O'Connor, Q.C.

For a great many years Mr. O'Connor has been all but unknown at the Bar, though prominent in politics; and all parties are agreed that the appointment was purely political. For this reason various opinions have been expressed as to his judicial capabilities; but they are, and must necessarily be, purely speculative.

We cannot afford to have the Bench placed amongst the rewards of politicians, and it is sincerely to be hoped that purely political appointments will in future be eschewed.

Professional Ethics.

In our last number we published an advertisement, taken from a local newspaper, in which it appeared that a connection had been formed between a practising solicitor and a gentleman whose name has lately been removed from the Roll of Solicitors. Acting upon this publication, the Benchers have passed a resolution calling upon the solicitor to explain his conduct. We hope that this may be a warning to many who are too ready to disregard professional ethics. If such styles of advertising have their local advantages, they are not unaccompanied by danger. We should like to see Convocation call upon some solicitors to explain their conduct in improperly advertising themselves merely.

BOOK REVIEW.

A Treatise of the Writ of Habeas Corpus, including Jurisdiction, False Imprisonment, Writ of Error, Extradition, Mandamus, Certiorari, Judgments, etc., with Practice and Forms. By WILLIAM S. CHURCH, of the California Bar. San Francisco: A. L. Bancroft & Co., 1884.

This book is too full to be read through by a practising lawyer, but that of itself is some guarantee of its usefulness. A short review of the plan or scheme of the book, commencing with the history of the writ, discloses (in addition to the various questions arising in the United States respecting the jurisdiction of the Federal and State Courts) a perfect mine of law on every branch of the subject. It is a work that must be referred to in habeas corpus cases.

REVIEW OF EXCHANGES.

American Law Review.—May-June, 1884.

The Formation and Validity of Voluntary Trusts, by SIMON GREENLEAF CROSWELL. Equity will enforce a trust based on a valuable consideration although the trust has not been completely formed. The learned writer proceeds to the enquiry whether equity will do the same for a voluntary trust, and if equity will not, when the trust is to be regarded as completely formed, and against whom the trust, when thus formed, may be enforced. These and other questions are treated at length. English and American cases are cited.

The "Legal Tender" Decision of 1884, by D. H. CHAMBERLAIN.

The Codification of Commercial and Maritime Law, by HARRINGTON PUTNAM. After commenting upon the general stability and uniformity of the maritime law and the catholicity of mercantile law as contrasted with the conflict of the rules of positive law prevailing in different countries, the learned writer reviews shortly the maritime and commercial codes of various nations and the progress of revision or codification which is going on; and he predicts that the maritime law of the United States will at a not distant day be made uniform.

The Authorship of the Statute of Frauds, by JAMES SCHOULER. The claims of Sir Lionel Jenkins, Lord Keeper Guilford, Lord Nottingham and Sir Matthew Hale to the honour of the authorship of this famous statute are weighed. The conclusion is reached that the statute probably embodied changes in the existing law long and carefully considered, before and during its passage through the Houses of Parliament, by those most eminent in the profession; but that reason, tradition and history concur in awarding special pre-eminence to the claim of Sir Matthew Hale to its authorship, although most, if not all of those named probably bore a part in framing it.

Central Law Journal.—4th January, 1884.

Liability of a Parent for the Torts of his Minor Child, by ELISHA GREENHOOD. Direct adjudications upon this subject appear to be few in number. The only English authority is *Moore v. Towers*, 8 C. B. (N.S.) 617; and the American decisions are limited to a bare half dozen. All these cases are commented upon, and they establish that the parent's

liability is not more extended than if the tort of the child were one committed by a servant. To render the parent liable, therefore, the act must be committed in his presence, or with his authority or approval; or in the course of a general employment; or the parent must subsequently ratify, or knowingly receive the benefit of the tort. The question is still a debatable one in the courts of most of the States.

Mistakes of Law, by CROSBY JOHNSON. The rule that ignorance of the law affords no excuse is one not merely of convenience, but of absolute necessity, and should be respected by the Courts as affording the only basis upon which social order can be maintained. As far as possible, the rule should be upheld in its integrity, and all exceptions sought to be introduced should be jealously scrutinized before being admitted. The following exceptions to the rule are held proper: (i) Where parties attempt to reduce their verbal agreement to writing, but the instrument, through some mistake of law, fails to express the actual contract made; (ii) Where one party is misled as to the law of a transaction by the false statement of the other party; (iii) Where one party to a transaction is ignorant of his legal rights, and the other party, though well aware of them, fails (contrary to a duty imposed by law) to inform him, whereby he suffers loss; (iv) The mistakes of lunatics and infants, and of their committees and guardians; (v) The mistakes of a person with regard to his own private legal rights, interest and liabilities; (vi) Cases where fact and law are so blended that it is impossible to say whether the mistake is one of law or one of fact. But the mere ground that both parties fall into a mutual mistake of the law, or that the mistake is of a clear, as opposed to a doubtful, principle of law, does not justify an exception to the general rule.

Ibid.—11th January, 1884.

Assumption of Mortgage, by FLOYD R. MECHEM. The liability of the purchaser of mortgaged premises who has expressly assumed and undertaken to pay the mortgage is treated of, viewing the question in reference to the rights both of the grantor and the mortgagee. A grantee may purchase merely subject to the mortgage, without personally assuming to pay it off, or becoming liable, *ipso facto*, so to do. But where the assumption of the mortgage debt forms part of the consideration for the purchase, the law implies a promise on the part of the grantee to indemnify the grantor to the extent of the value of the property, independently of any specific agreement to that effect. The latter of course would create a personal liability, as would also such words and circumstances as will clearly import that the grantee intended to assume all responsibility. In England, in the absence of a personal covenant, the extent of the liability is the value of the land; but in New Jersey and in Michigan, the Courts incline to hold that the purchaser is bound to indemnify the vendor, without regard to the value of the land. The English doctrine obtains in Massachusetts. The subject is treated under the heads, (i) How the promise may be made; (ii) The grantee's liability to the grantor; (iii) The grantee's liability to the mortgagee; (iv) The legal relationship of the grantee to the mortgagee.

Ibid.—18th January, 1884.

Twice In Jeopardy, by MURAT W. HOPKINS. The maxim of the common law that no man shall be brought into jeopardy of his life more than once for the same offence, is incorporated into the Constitution of the United States. Jeopardy of an included offence, on an indictment for the included offence only, constitutes such a jeopardy as is a bar to a prosecution on an indictment for the greater crime. The discussion is confined to a portion only of the general subject, the question, namely, When does the jeopardy contemplated by the Constitution attach? The answer is, that jeopardy attaches when the trial is actually entered upon and not before. The accused must have pleaded to the indictment and the jury be sworn, or, at the least, impanelled. The jeopardy need attach for a moment only.

A Mine of Law, by ELISHA GREENHOOD. The cases reported in the forty-ninth volume of American Decisions are examined, and the most important digested under the following heads: devise with absolute power of disposal; enforcement of property rights in letters; ratification of void contracts; evidence; statute of frauds; public policy; public officers; limitations; wills; conveyances; constitutional law, and conflict of laws.

Ibid.—25th January, 1884.

Twice In Jeopardy, by MURAT W. HOPKINS. The article upon this subject in the last number is continued and concluded. An accused has a right to a verdict when once in jeopardy on a valid indictment, and it will operate as a release if the jury be discharged before the expiration of a reasonable time. The inability of a jury to agree does not present such a case of necessity as would authorize a Court to discharge them. "It is established, that one is not in legal jeopardy if the jury be discharged with the consent of the accused, expressed or implied; or, if a new trial is granted or verdict set aside on defendant's motion; or if the Court has no jurisdiction; or if the first indictment was clearly invalid and insufficient; by reason of any other irregularities which prevent a lawful verdict, but, otherwise, if the accused has been tried upon the merits of the cause, and the same, if judgment thereon has been executed and performed; nor, if the term of Court, as fixed by law, comes to an end before the verdict is reached."

Intoxication as a Defence in Civil Cases, by JOHN F. KELLY. Intoxication *per se* is not a defence, though complete intoxication may produce an act the result of which is negligence, or contributory negligence. In torts, if the intoxication is the only one possible and essential cause for the injury and is sufficient without any intervening cause, it is negligence, and a good defence; but if the injury might, or did, result from other causes, the intoxication is not a defence. Intoxication at the time of the accident is not negligence *per se*; a drunken man is as much entitled to a safe road as a sober one. The question is not, was the plaintiff intoxicated? but is, whose negligence caused the injury? In contracts,

the intoxication, to be a ground of relief, must be so far complete as to render the plaintiff unable to comprehend the nature of the transaction and his own acts. If the defendant brought about the intoxication, or took advantage of it, a less degree may entitle the plaintiff to set aside the contract. Numerous cases are cited.

Ibid.—1st February, 1884.

Costs in Will Contests, by ELISHA GREENHOOD.

Ibid.—8th February, 1884.

Fraudulent Trade-marks. "There is a line of authorities both in this country and in England, applying the maxims of *ex turpi causa non oritur actio*, and in *pari delictu potior est conditio defendentis*, to such cases. The position held is, that where a label is so worded as to contain a distinct assertion which is false, the right to the exclusive use of it will not be maintained. To protect such a trade-mark, would be to lend the aid of the Court to a scheme to defraud the public."

Ibid.—15th February, 1884.

Party Walls, by F. M. BIXBY. The common use of a wall separating adjoining lands of different owners is, in the absence of statutory provision or express agreement, *prima facie* evidence that the wall, and the land on which it stands, belong to such owners in equal moieties, and if one adds to the height of such wall and the other pulls down his addition, the former may maintain trespass for his portion thereof. Whether a structure is a party wall, is a question of fact and not of law. It may be a party wall to the common height of both buildings, and cease to be such for the rest of its height. When the party wall is interfered with by one, as by raising it, he is liable as insurer for any loss which may be occasioned to his neighbour. In the absence of agreement regulating the height, each may raise the wall, if it can be done without injury to the rights of the other, but if the original agreement is for a dead wall, there can be no windows or other openings made in the addition. Where a party wall is destroyed by fire, there is no implied agreement between the adjoining owners that the wall shall be rebuilt in like manner, on the same foundation; and if one so rebuild he cannot compel a purchaser from the other proprietor to contribute to the cost of the wall or to compensate him for using it. But when one of the buildings is destroyed, but the wall is left standing, the easement is at an end, and each owner becomes the owner in severalty of his own soil, and of so much of the wall as stands thereon, with a perfect right to tear it down or dispose of it in any way he may see fit. American and English decisions are cited.

Ibid.—22nd February, 1884.

Liquidated Damages and Penalties, by ISSAC N. PAYNE. The question, when the specific sum designated by the parties to an agreement, as damages for its breach, is to be regarded as a penalty, and when as liquidated damages, is considered, and an examination of the cases made.

The Courts base their decision upon the consideration of three points: (i) the language of the contract, (ii) its subject matter, (iii) the intention of the parties. But the language will be disregarded when inconsistent with either the subject matter or the intention of the parties. Courts will always declare the sum a penalty, if by any reasonable construction it can be done, except where the damages are uncertain, or are very difficult to ascertain, when the damages will be treated as liquidated, if they be so called in the instrument.

Ibid.—29th February, 1884.

Federal Arrests of State Prisoners, by ELISHA GREENHOOD. The right of the Federal authorities to arrest a prisoner when held under bail for a violation of State law, is briefly treated of.

Authority of Agents to Collect for their Principals. The subject is treated under the heads, Agents to Take Security, Miscellaneous Agents, Agents to Sell, Travelling Salesmen. Numerous authorities are referred to.

Ibid.—7th March, 1884.

Tenancy by the Entirety, by W. W. THORNTON. A well written contribution. The learned writer explains fully the nature and requisites of a tenancy by the entirety, pointing out wherein it differs from both a joint tenancy and a tenancy in common. The question whether husband and wife can take an estate in severalty is considered, and the opinion expressed that they can, notwithstanding contradictory decisions. The cases cited are very numerous.

Voluntary Payments, by ISAAC H. LIONBERGER. Voluntary payments are payments of money which was not due, under such circumstances that the recovery back of the money so paid is opposed by the maxims and principles of law. Examples of such payments are, money paid under a mistake of law, and money paid without protest, unless under a mistake of fact; such cannot be recovered back. On the other hand, money paid by a man to save his life or to preserve his liberty, or to protect or regain possession of his property, may be recovered back, as paid upon compulsion.

Ibid.—14th March, 1884.

Foreign Judgments, by JAMES M. KERR. In England (and in Ontario, *Warrener v. Kingsmill*, 8 U. C. R. 407, *Burn v. Bletcher*, 23 C. R. 28) the rule is settled that the judgment of a foreign Court is conclusive so far as to preclude a re-trial of the cause upon its merits, when the defendant resided within the territorial jurisdiction of the Court rendering the judgment, and the cause was one over which it had jurisdiction, or such defendant by some act submitted himself to the jurisdiction of the Court. But the defendant is always at liberty to show that the foreign court had no jurisdiction, that he was never served with process, or that the judgment was fraudulently obtained. Where the subject matter of the controversy is land, it is a well recognized principle in all countries where

the common law prevails, that a judgment pronounced in the *forum rei sitæ* is absolutely conclusive. The burden of showing the invalidity of a foreign judgment produced in evidence, which appears to be regular in form and to contain the essential facts of an adjudication of the controversy between the parties, rests upon the party impeaching it. Service of process beyond the jurisdiction of the Court cannot oblige the defendant to appear and defend in that Court, and a judgment upon such service, where no appearance is entered by the person so served, can impose no personal liability which will be recognized beyond the state in which the action originated.

Ibid.—21st March, 1884.

Warranties by Agents in Sales, by ELISHA GREENHOOD. The recent English decision in *Brooks v. Hassell* (49 L. T. N. S. 569) furnishes the text. The extent to which the leading English cases are followed in various states is noted, and a digest given of American cases upon the general subject. "The tendency of the latest authorities is to restrict the power to warrant to those cases where it is customary to warrant, and the burden of proof is upon the purchaser to show that such warranty is usual."

A Reasonable Time, by ADDISON G. MCKEAN. What is a reasonable time is a mixed question of law and fact, and should be left to the jury, save where the facts are admitted, or agreed upon, or are found by special verdict, when it becomes the province of the Court to decide.

Ibid.—28th March, 1884.

Malicious Prosecution of Civil Cases, by M. W. HOPKINS. American Courts appear to have advanced beyond what is warranted by any English decisions, in awarding a right of action to one who has been prosecuted maliciously and without probable cause in a civil suit. The grounds upon which they proceed, and the measure of damages where relief is granted, are clearly stated. It is doubtful if their doctrines would be favourably received in our own Courts.

Discharge and Forfeiture of Recognizances, by ELISHA GREENHOOD. A liberal reference to American cases is made, and the points established by them succinctly set forth.

Ibid.—4th April, 1884.

Proof of Legitimacy, by JOHN D. LAWSON. The earlier and more modern doctrines of the Courts upon this subject are given. The judgment of Leach, V.C., in the case of *Head v. Head* (1 Sim. & Stu. 150), is abstracted, and declared to lay down correctly what is the law of both England and the United States at the present time.

Ibid.—11th April, 1884.

Insanity in Will Contests—Burden of Proof, by ELISHA GREENHOOD. In the majority of the States of the Union, the sanity of testators is presumed, and no affirmative proof of mental capacity is required, the *onus* resting upon the contestants to disprove it. In four States only does

the *onus* rest upon the party propounding the will. The learned writer, while expressing great diffidence in advancing views which are in the face of what he deems the overwhelming weight of judicial opinion in the United States, declares his adherence to the doctrine upheld in the minority of States, and maintains that the first rule is unsound in principle. He argues that until the Statute of Wills was enacted, the right of *disherison* did not exist; the law, upon the death of an owner of land, instantly and without any formality crowned the heir with the ownership; that the Statute made a change in this regard upon certain conditions being fulfilled; that the Statute, being subversive of the Common Law, was to be most strictly construed; and that, inasmuch as the Statute requires the will to be one of a person of sound and disposing mind, the heir, who would otherwise take, is entitled to demand proof that the testator was possessed of such mind, just as he could insist upon evidence being brought forward that every other requirement of the Statute was fulfilled. It may afford gratification to the learned writer to know that the doctrine upheld by the Courts of this Province is identical with what he advocates as the true one; see *Thompson v. Torrance*, 9 App. Rep. 1.

Ibid.—18th April, 1884.

State Abolition of the Grand Jury no Violation of the Fourteenth Amendment, by ELISHA GREENHOOD. Extracts are given from the judgments delivered by the Supreme Court of the United States upon appeal from the Supreme Court of California in the case of *State v. Hurtado*. The former Court determines that a State may abolish or regulate its jury system in any manner not inconsistent with its own constitution.

Evidence in Bastardy Cases, by WM. M. ROCKEL. The article deals with that class of cases where the illegitimacy of the child is admitted, but it is sought to fix its paternity upon a certain person, and compel him to maintain it. The proceeding is generally held a civil one, but has some of the characteristics of a criminal prosecution. The rules of evidence governing civil actions are to be applied. As a rule statutes govern the procedure in the different States. Evidence of the general reputation of the mother for chastity is immaterial and irrelevant, and should not be admitted. What evidence is material to be shown is considered, and numerous authorities cited.

Restraints upon Alienation—Thwarting a Testator's Intentions, by ARTHUR H. WELLMAN. The learned writer questions the expediency of the doctrine upheld in the English Courts, in obedience to which property bequeathed to trustees with a direction to permit it to accumulate or to postpone payment until some period after the legatee attains his majority, may be ordered to be surrendered to the legatee immediately upon his attaining his full age. *Saunders v. Votier*, 4 Beav. 115, and *Gosling v. Gosling*, Johnson, 265, are cited as cases exemplifying the doctrine in England. American authorities are then examined and shown to favour a negation of this rule, and to exhibit a strong leaning towards carrying out the intentions of the testator without regard to it.

Ibid.—25th April, 1884.

Mandatory Injunctions, by W. W. THORNTON. The circumstances under which the writ or order will be granted or refused, as exhibited in reported cases, as well as its form and scope, are briefly treated of.

Tenancies by the Entirety under the Married Women's Acts. After noticing the almost universal adoption by English-speaking peoples, of legislation upon the subject of married women's separate property and rights, tending towards a more or less complete removal of common law disabilities, the learned writer refers to the decision in *Re Beach Mander v. Harris*, 47. J. P. 23, under the Married Women's Property Act, 1882, as defining the extent of the changes wrought by that Act in the old law in England, and then proceeds to review the decisions upon American Statutes of a similar character. The opinion is expressed that legislation in this direction is opposed to the true interests of the class in whose favour it is assumed to be passed, and has been found productive only of increased domestic infelicity. In this view the duty of Courts to concede no more than the strict letter of such Acts may demand, is insisted upon.

Ibid.—2nd May, 1884.

Mandatory Injunctions, by W. W. THORNTON. A continuation of the contribution upon this subject by the same writer in the last number.

Assignment of Life Insurance Policies, by W. T. BROWN. An insurable interest is essential to the validity of a contract of insurance. Wager contracts are generally prohibited by statute, but are unlawful even at common law, as clearly opposed to public policy. The question of what constitutes an insurable interest in the life of another is discussed. Every man has a right to insure his own life, but there is conflict of opinion whether one who holds a policy upon his own life can make a valid assignment of it to another who has no insurable interest. The Courts in New York, Vermont, and Rhode Island, hold the affirmative; those in Massachusetts, Pennsylvania, and three other States, hold the negative. The Supreme Court of the United States decides, in *Warnock v. Davis*, 104 U.S. 775, as follows: "If there be any sound reason for holding a policy invalid when taken out by a party who has no interest in the life of the assured, it is difficult to see why that reason is not as cogent and operative against a party taking an assignment of a policy upon the life of a person in which he has no interest. The same ground which invalidates the one should invalidate the other, so far at least as to restrict the right of the assignee to the sums actually advanced by him. In the conflict of decisions on this subject, we are free to follow those which seem more fully in accord with the general policy of the law against speculative contracts upon human life." The learned writer throws in the weight of his opinion with this view. It may be noted, however, that the Supreme Court of Canada declares the law of this Dominion to be otherwise. In the case of *Vicina v. The New York Life Insurance Company*, 6 S.C.R. 30, the opinion of the Court is given by the Chief Justice in these words:—"Where a

life policy, effected by one who has an interest, is assigned, it is not necessary that the assignee should have any interest, or even that he should have paid any consideration; for it has been decided that he stands on the rights of the party who effected the insurance." The appeal in this case was from the Court of Queen's Bench for Lower Canada, but the articles of the Civil Code applicable to the subject are declaratory simply of the English common law.

Ibid.—9th May, 1884.

Argument of Counsel, by W. A. ALDERSON. The subject is treated under the following heads:—Going out of the evidence; the opening statement; inferential argument; argument of the law to the jury; reading books to the jury; limiting time of argument; slanderous utterances; waiving argument; requirements of opening and closing argument; right of counsel generally; right to open and close; saving exception to error in argument.

Habeas Corpus, by SAMUEL MAXWELL. American and English cases are cited. The practice upon the issue, conduct and return of the writ is shortly treated of.

Ibid.—16th May, 1884.

Parol Explanations of Endorsements. *Macdonald v. Whitfield*, 49 L.T.N.S. 446, forms the text of this very excellent article. The authorities cited are numerous.

Criminal Law Magazine.—March, 1884.

Criminal Contempts, by SEYMOUR D. THOMPSON. The subject is treated in two parts (i) questions of jurisdiction and (ii) matter of contempt. The power to punish for contempt is inherent in the legislative bodies of sovereign States, but is not possessed by the legislative bodies of British colonies and dependencies except where expressly granted by Act of the Imperial Parliament. At common law every Superior Court of record has an inherent power to punish for contempts committed in its presence and against its authority; and every such Court is the exclusive judge of such contempts. It is immaterial that the offence is indictable. Inferior courts not of record, and municipal councils have not, as a rule and in the absence of statutory authority, any power to fine and imprison for contempt. Nor can Justices of the Peace, their only right being to compel the contemner to find sureties to keep the peace, and commit him in default thereof. The various punishments by fine and imprisonment are treated of, as well as the acts which courts have held to be contempt.

The Relative Operation of Prohibition, Local Option and License Laws, by L. M. DORMAN. A discussion of the liquor question and the effect of the different measures proposed to enable the State to deal with it.

Ibid.—May, 1884.

Ex post Facto Laws and Bills of Attainder, by W. W. THORNTON.

THE
CANADIAN LAW TIMES.

OCCASIONAL NOTES.

ONTARIO.

Supreme Court of Judicature.

COURT OF APPEAL.

Q. B. D.]

[5TH SEPTEMBER, 1884.]

VOGEL v. GRAND TRUNK RAILWAY CO.

Railway Company—Consolidated Railway Act, 1879—Grand Trunk Railway Co.—Condition against loss by negligence—Special contract for carriage.

The Court being equally divided the appeal was dismissed.

Bethune, Q.C., for the appellants.

G. D. Dickson, for the respondent.

PROUDFOOT, J.]—

In re CHARLES; FULTON v. WHATMOUGH.

Will, construction of—Vesting—Executory interests.

Held, Burton, J.A., dissenting, reversing the decision of the Court below,
1 Ont. R. 362; 2 C. L. T. 308, on the facts there stated, that the children

of the testator who survived the widow and attained twenty-one years of age took vested interests, and that the grandchildren took nothing.

Mowat, Q.C., A.-G., for the appellants.

Beaty, Q.C., Davidson and Plumb, for the respondents.

[8TH SEPTEMBER, 1884.

CORBET v. JOHNSON.

Breach of contract—Measure of damages—Loss of profits.

The plaintiff agreed to complete the manufacture of a steam engine by a certain day, to be delivered to the defendant, who had previously been using water power in his mill. The engine was not completed and delivered for some time afterwards. The Master at Owen Sound, in estimating the damages of the defendant, allowed him, in addition to rental of the mill and interest on the value of the machinery and of logs waiting to be sawed, loss of profit \$118. On appeal from his report, Proudfoot, J., made an order which contained a declaration "that the true measure of damages the defendant is entitled to claim is the amount which would have been earned by the mill in the ordinary course of employment," and referred it back to the Master to review his report. An appeal to this Court was allowed, the Court being of opinion that the Master could not on the direction given him find otherwise than he had done.

Bethune, Q.C., and *D. A. Creasor*, for the appellant.

Lane, Q.C., for the respondent.

[5TH SEPTEMBER, 1884.

KELLY v. IMPERIAL LOAN & SAVINGS CO.

Mortgage with power of sale—Irregular foreclosure—Sale of premises—Conveyance—Exercise of power of sale.

The defendants assumed to foreclose a term mortgaged to them by the plaintiff. They subsequently sold and assigned the term by a conveyance which did not recite or otherwise indicate the title under which they claimed. The plaintiff brought an action to redeem the premises on the ground that the foreclosure was void.

Held, that the conveyance being for value might be supported as an exercise of the power of sale contained in the mortgage.

Moss, Q.C., and *Cassels, Q.C.*, for the appellants.

Plumb and Wallace Nesbitt, for the respondents.

FERGUSON, J.]

[12TH SEPTEMBER, 1884.]

GAGE v. CANADA PUBLISHING CO.

Trade mark—Family name—Sale of article bearing name—Future use of name in same manner—Fraud.

The judgment of Ferguson, J., 3 C. L. T. 101, was affirmed.

Robinson, Q.C., and Davidson, for the appellants.

S. H. Blake, Q.C., Moss, Q.C., and Lash, Q.C., for the respondents.

C. C. BRUCE.]

COOPER v. DIXON.

Assignment in trust for creditors—Execution of deed by trustee.

A trader who was in embarrassed circumstances made an assignment for the benefit of creditors, of all his estate, real and personal, to the plaintiff, who held a mortgage on a part of the realty as security against his indorsement for the assignor of notes then current. No creditor joined in the conveyance, nor was the consent to or knowledge of it by any creditor shown.

Held, affirming the judgment of the Court below, that the property was liable to seizure under execution, for under the mortgage the trustee was not a creditor.

Semble, per Patterson, J.A., that had the trustee been beneficially interested in the proceeds of the property, his assent would have rendered the deed irrevocable.

High Court of Justice.

QUEEN'S BENCH DIVISION.

[WILSON, C.J., AND OSLER, J.A., 12TH SEPTEMBER, 1884.]

MARA v. COX.

Broker—Pledge of stock—Sale by pledgee—Usage and custom of brokers—New trial.

The plaintiff, a broker, pledged certain stock with the defendants, brokers, for advances, the object of the plaintiff being to buy stock largely and hold it for a rise in the market; and it was agreed that if the plaintiff

became in default for interest or in keeping up his margin, the defendants should be at liberty, on two days' notice, to sell the stock. The defendants, being in need of that stock, immediately used it for the purpose of filling their own engagements. Subsequently the defendants alleged that the plaintiff was in default, and the plaintiff, not being aware that they had disposed of his stock, gave them his promissory note for the amount claimed by the defendants. He subsequently discovered that they had sold the stock. The defendants set up in defence to this action an alleged custom of brokers, that upon stock being pledged to a broker he might use it as his own, being ready to return to the pledgor when called upon an equal number of shares of the same stock.

Held, that no such custom was proved, nor would such a custom be valid; that the parties might have agreed to be bound by such a manner of dealing; but in this case no such agreement was proved.

Held, also, that the defendants might lawfully have re-pledged the stock to enable them to raise the advances to the plaintiff, but that the sales and other dispositions of the stock by the defendants without notice to the plaintiff, and when he was not in default, were wrongful, and that the plaintiff was entitled to recover from the defendants the prices at which they sold the stock.

The jury found that the settlement which resulted in the plaintiff's giving notes to the defendants was made by him with full knowledge of his rights, but under pressure, and on this and other findings a verdict was entered for the defendants. The Court being of opinion that the plaintiff was entitled to a verdict but for this finding, and that the finding was against law and evidence, directed a new trial.

Osler, Q.C., and *Wallace Nesbitt*, for the plaintiff.

S. H. Blake, Q.C., and *J. K. Kerr, Q.C.*, for the defendants.

BROWN v. NELSON.

Contract—Part performance—Rescission.

The plaintiff agreed to purchase from the defendant seventy-six shares of the capital stock of the *Globe Printing Company*, which he held as the representative of G. B.'s estate. The defendant being anxious to obtain money for the estate, the plaintiff gave to the defendant his note for the value of the shares, and at his request pledged the seventy-six shares and forty-four other shares belonging to himself, to a bank, which discounted the note. It was agreed that the defendant, who had a controlling interest in the *Globe Printing Company*, should continue the plaintiff in the position which he occupied as managing director of the Company, at a fixed salary. The defendant, who had endorsed the note to the bank, retired it at maturity and took an assignment of the shares to himself. The plaintiff,

having been dismissed from his position as managing director, brought this action for a return of the forty-four shares, on the ground that the purpose for which they had been pledged, viz., to raise money for G. B.'s estate, had been fulfilled, and for a return of the notes and to be relieved from the purchase of the seventy-six shares on the ground that the condition of the purchase, viz., the being retained in office, had not been fulfilled.

Held, that as there had been a partial performance of the defendant's agreement by retaining the plaintiff for a period as managing director, there could be no rescission of the whole contract; that the plaintiff was entitled to a return of his shares; that the defendant was entitled to judgment for the value of the seventy-six shares; and that the plaintiff must assert his claim, if any, for wrongful dismissal, by a separate action.

Osler, Q.C., and *Wallace Nesbitt*, for the plaintiff.

Robinson, Q.C., and *C.R.W. Biggar*, for the defendants.

[CAMERON, C.J., 2ND SEPTEMBER, 1884.]

In re MUSKOKA & GRAVENHURST.

Municipal Act—Arbitration and award—Time for making award—Interest of arbitrator—Filing evidence—Award ordered to be made by Chancery Division—Setting aside in Q. B. Division.

An award made by arbitrators pursuant to the Municipal Act, R.S.O. cap. 174, is not invalid, though made more than a month after the appointment of the third arbitrator, notwithstanding section 377 of the Act.

By section 378 of the Act, no member, officer, or person in the employment of a corporation interested in any arbitration, nor any person so interested shall act as an arbitrator under the Act.

Held, that the disqualification of interested persons is absolute, and waiver of or acquiescence in the appointment of an interested person will not validate it.

By section 383 the arbitrators are to file with the Clerk of the Council the notes of the evidence taken. There being two Councils interested in this arbitration, the arbitrators did not know with which clerk to file the evidence, and did not file it.

Held, that the award was not thereby invalidated.

The award having been directed to be made within a year by an order of the Chancery Division where the parties were litigating concerning it, the Court refused to entertain the merits, but held that for that purpose the motion should be transferred to that Division.

Shepley, for Muskoka.

Laidlaw, for Gravenhurst.

In re ONTARIO & QUEBEC RAILWAY COMPANY v. TAYLOR.

Railway Company—Expropriation—Award—Compensation for possible damage by felling trees—Mode of estimating compensation—Damages—Notice, sufficiency of.

The right of a Railway Company to cut down trees for six rods on each side of the railway, under Consolidated Railway Act, 1879, sec. 7, s-s. 14, is entirely distinct from the right to expropriate land for the road, and has nothing to do with the compensation to the owner for land so expropriated, and forms a distinct subject of arbitration.

Held, therefore, that an award was bad in allowing compensation to the owner of land expropriated by a Railway Company for the damage that might accrue to the owner by the possible exercise of the right to fell trees adjacent to the expropriated land.

Quære, whether under the Consolidated Railway Act, 1879, more than the value of the land actually taken can be allowed, as the Act does not contain a section equivalent to sec. 7 of R.S.O. cap. 165, which includes compensation for damages to lands injuriously affected.

Semble, that where a parcel of land is severed by the railway the actual value is the difference between the value of the land before the expropriation, and the value to the owner of the remainder after the expropriation.

Held, that the possible damage to land from greater exposure to winds and storms, and the greater liability to injury by fire by reason of the working of the railway, were contingencies too remote to be considered in estimating the amount of compensation where there were no buildings to be endangered.

The notice by the Railway Company included compensation "for such damages as you may sustain by reason or in consequence of the powers above mentioned."

Held, sufficient to allow the arbitrators to award damages resulting to the owner from the expropriation.

Hector Cameron, Q. C., and Wells, for the Railway Company.

Leys, for the owner.

[ROSE, J., 2ND SEPTEMBER, 1884.]

SLATER v. ANTHONY.

Sheriff—Interpleader—Abandoning goods—Attachment.

Under an execution in *McLean v. Anthony*, the sheriff, on the 17th April, 1883, having seized the defendant's goods, sold them to one Ferguson, there being at the time rent overdue to the landlord. Ferguson did not remove the goods from the premises. By agreement between the landlord, the sheriff and Ferguson, the latter retained sufficient of the purchase money

to pay the claim for rent. Subsequently Ferguson sold the goods to English, when it was arranged that English should pay the old claim for rent, and a further instalment which had meanwhile fallen due. The defendant then surrendered his term, and English became tenant. On 23rd April, the execution in *Slater v. Anthony* was placed in the sheriff's hands, and he seized the same goods some time between 21st May and 23rd June. English having claimed the goods the sheriff interpleaded, and an issue was directed which resulted in favour of Slater. Pending the interpleader issue, the sheriff allowed the landlord's bailiff, who also claimed the goods for arrears of taxes, to sell them and pay the rent and taxes in arrear. At the conclusion of the interpleader issue, it appeared that the sheriff had taken no security for the goods, and that English the claimant was worthless.

Held, that the sheriff was liable to an attachment on motion of the execution creditor.

Aylesworth, for the execution creditor.

Holman, for the sheriff.

CHANCERY DIVISION.

[BOYD, C., 5TH SEPTEMBER, 1884.]

GRASETT v. CARTER.

Trespass by building—Continuing trespass—Injunction to restrain trespass—Right to removal of building thereunder—Motion to commit for breach of Injunction—Sufficiency of notice of motion—Judgment in Supreme Court—Service of same—Revivor of case while in appeal—Improvement of land under mistake of title—Compensation.

The plaintiff alleged in the bill of complaint that the defendant was trespassing by building a wall on a small portion of the plaintiff's land, and a decree was made at the hearing which, after declaring that the wall was built upon the plaintiff's land, awarded an injunction to the plaintiff "perpetually restraining the defendant from trespassing upon" the plaintiff's land. The defendant remained passive and refused to take down the wall.

Held, that allowing the wall to remain was a breach of the injunction, and that the plaintiff was entitled to a removal of the wall by the defendant, and an order was made that if he did not remove it within a month he should be committed for breach of the injunction.

While the appeal to the Court of Appeal from the decree was pending, the original plaintiff died, and the suit was revived by an order issued in the Chancery Division, the suit having been begun in the Court of Chancery.

Held, that the suit was properly revived, there being no machinery in the Court of Appeal for reviving suits, and that it made no difference whether the revivor was before or after judgment in appeal.

The Court of Appeal reversed the decree and ordered the bill to be dismissed, but the Supreme Court of Canada, while affirming the decree, made a slight amendment thereof without substantially altering it. The original decree was served on the defendant but not the certificate of the Supreme Court.

Held, that want of service of the certificate was no answer to the motion to commit.

The notice of motion to commit did not specify any acts of disobedience which the plaintiff relied on as breaches of the injunction; but it clearly appeared from correspondence between the plaintiff's solicitors and the defendant, that the latter was aware that the former required the removal of the wall, and that the defendant's refusal to remove it occasioned the motion to commit.

Held, that it was not necessary under these circumstances to set out the breaches complained of in the notice of motion.

In answer to the motion the defendant claimed that the form of the decree was such that he was not bound to remove his wall, but that he might keep it standing on making compensation to the plaintiff under R.S.O. cap. 95, sec. 4. No case was made by his pleadings for compensation, nor did he ask for it at any previous time during the action.

Held, that it was clearly not a case for compensation.

MacLennan, Q.C., and *E. Douglas Armour*, for the plaintiff.
George Bell, for the defendant.

[PROUDFOOT, J., 21ST JUNE, 1884.]

BANK OF BRITISH NORTH AMERICA v. WESTERN ASSURANCE COMPANY.

Insurance—Double insurance—Contribution—Claims to be reported for adjustment—Condition precedent.

In order to constitute a double insurance, there must be two or more insurances on the same subject, the same risk, and the same interest; and variations in the several policies as to the extent of liability do not vary the risk.

The plaintiffs were assignees of a certificate of insurance issued by the defendants on cattle shipped from Boston to England. The owners' agents in England insured in English Companies, and the policies of the latter were existing together with the plaintiffs' when a loss occurred.

Held, that the defendants were liable for the full amount of the loss, but were entitled to contribution from the English companies.

Held, also, that if the English policies had been cancelled, the defendants would have been liable for a rateable proportion of the loss only.

The defendants insured cattle shipped from Boston to England, the condition of payment being that all claims should be reported to the U. M. Ins. Co. of Liverpool as soon as the goods were landed or the loss known, to be adjusted according to usage there and the special conditions of the contract of insurance.

Held, that the adjustment by the U. M. Ins. Co. was not a condition precedent to the plaintiffs' right to recover on a loss happening.

[17TH SEPTEMBER, 1884.]

CASNER v. HAIGHT.

Mortgage—Bar of dower—Foreclosure—Redemption by wife.

A mortgage, dated after 42 Vict. cap. 22, in which the mortgagor's wife barred her dower, was foreclosed in an action against the husband alone. The mortgagor's wife now brought this action for redemption, her husband being still alive. A demurrer to the statement of claim was allowed.

Moss, Q.C., for the demurrer.

Mackenzie, Q.C., contra.

[29TH SEPTEMBER, 1884.]

SMITH v. MARRIN.

Motion to commit—Personal service.

Hoyles moved to commit the defendant for non-attendance on an appointment for his examination.

Bain, Q.C., took the objection that the notice of motion to commit was served on the defendant's solicitor only, whereas it should have been served personally. He cited *Mann v. Perry*, 44 L. T. 248, and *Tilney v. Stansfield*, W. N. 1870, p. 77.

Hoyles, in reply, cited *Wilson v. Wilson*, 7 P.R. 57; *Browning v. Sahim*, 5 Chy. D. 511; *Richards v. Kitchen*, 2 W.R. 602.

PROUDFOOT, J., sustained the objection, holding that the later cases must govern the practice, and he refused the motion.

[FERGUSON, J., 2ND JUNE, 1884.]

In re BIGGAR; BIGGAR v. STIMSON.

Will, construction of—Gift to parents and children—Concurrent gift—Gift of personalty to legatee and her heirs—Gift of personalty to the wife of B. and his heirs—Dower—Election.

A testator devised and bequeathed to "G. B. and her children [certain and], the wife of C. R. B. and his children, appointing C. R. B. and G. B. joint guardians for the children above-mentioned, and five hundred dollars, all transactions to be null and void unless sanctioned in writing by both guardians."

Held, a gift to G. B. and her children concurrently, and that G. B. and and C. R. B., the former for herself, and both as trustees for the children could give a valid receipt for the legacy.

The testator devised and bequeathed to his "son G. G. B.'s wife, E. B. [lands in Ohio, U. S. A.] and \$5,500. This bequest is under the joint management of G. G. B. and his wife for their heirs. Should there be none, then at their death to revert back to my heirs to be equally divided."

Held, that G. G. B. and E. B. took the legacy in trust for E. B. for her life, and after her death for any children of G. G. B. and E. B. answering the description "their heirs"; if no such children, then in trust for the heirs of the testator; and that G. G. B. and E. B. could give a valid receipt for the legacy.

The testator bequeathed to his "son M. R. B.'s wife and his heirs \$5,000, and appoint M. R. B. as guardian and manager of that bequest."

Held, that M. R. B. took the legacy in trust for his wife during his life, and after his death the same to be distributed amongst the wife, or her representatives, and those persons who would answer the description of heirs of M. R. B.

The testator devised and bequeathed to his widow a dwelling house for her life, the household goods therein, and an annuity of \$300 a year secured to her out of the estate. The gifts were not stated to be in lieu of dower.

Held, that the widow was not put to her election.

[13TH JUNE, 1884.]

BRYSON v. ONTARIO & QUEBEC RAILWAY CO.

Married woman—Agreement to sell land—Non-concurrence of husband—Specific performance.

The female plaintiff, who was married to her co-plaintiff in 1876, agreed in writing, signed by herself alone, to sell lands owned by her at the time of her marriage to the defendants for the use of their railway. In an action to compel the defendants to arbitrate respecting the land, on the ground that the agreement, not having been signed by the husband, was not binding on the wife,

Held, that the defendants, on their counter claim, were entitled to specific performance of the agreement.

Moss, Q.C., and *Dumble*, for the plaintiffs.

Geo. Tate Blackstock, for the defendants.

[23RD JUNE, 1884.]

McCARTHY v. COOPER.

Specific performance—Conveyance signed and sealed but not delivered—Statute of frauds.

A conveyance of lands was signed and sealed by the authorized agent of a vendor, and by the purchaser, and recited payment of the purchase money though but ten per cent. had been paid.

Held, a sufficient memorandum within the statute of frauds to charge the purchaser, and specific performance was ordered.

Geo. Tate Blackstock, for the plaintiff.

Black, for the defendant Cooper.

H. W. M. Murray, for the defendant Oliver.

THE PHOENIX INSURANCE CO. v. CITY OF KINGSTON.

Assessment and taxes—Foreign corporation—Income—Personal property.

The interpretation clauses of the assessment Act, R.S.O. cap. 180, apply to 43 Vict. cap. 27 (O), and therefore the expression "personal property" in section 1 of the latter Act includes income.

Held, that the premiums received by the agent at Kingston, Ontario, of an English Insurance Company, having its head office for Canada at Montreal, Quebec, were assessable as income against the Company and its agent at Kingston.

Britton, Q.C., for the plaintiff.

Walkem, Q.C., and *Agnew*, for the defendants.

[4TH SEPTEMBER, 1884.]

HALLIWELL v. THE SYNOD OF ONTARIO.

*Ecclesiastical law—Revocation of incumbent's license by bishop without trial—
Right of incumbent to trial by Diocesan Court.*

The Rev. J. H., being the incumbent of a Parish in the Diocese of Ontario which was endowed, and having acted in such capacity and performed the duties thereof for several years, discontinued the services in two other churches which were attached to his parish. A commission was issued by the bishop under the provisions of canon No. 8 of the Synod of the Diocese, "to enquire into the causes which led to the closing of the said churches and to report whether there was 'lawful excuse' for the said Rev. J. H.'s discontinuance of the exercise of his ministerial offices in said churches, and to report whether there was sufficient *prima facie* ground for instituting further proceedings against the said Rev. J. H. as provided by said canon." The commissioners reported that the churches had been closed "because the members of the church refused to attend and provide for the ministrations of the Rev. J. H. in these churches;" that an estrangement existed between the Rev. J. H. and his parishioners, and that they declined his ministrations; but that, in their opinion (the commissioners'), the proofs adduced were not of such a nature as could be relied on to procure a conviction in an ecclesiastical Court; and they declined to recommend the prosecution of further legal action, although they believed that there was no hope of a restoration of his ministerial usefulness there, and that there was a sufficient *prima facie* ground for instituting further proceedings against him as provided by canon 8; but they were of opinion that, without the production of other and much stronger evidence than that adduced, the institution of further proceedings would not result in a charge of breach of discipline under the said canon being sustained. After the making of this report, and upon the said Rev. J. H. refusing to resign his said incumbency, the bishop, by an instrument under seal, revoked, or purported to revoke his license, and appointed A. F. E. as his successor, and the Synod declined to pay him (the Rev. J. H.) the annual proceeds of the endowment. Upon an action being brought by the said Rev. J. H. to compel the Synod to pay him such annual proceeds it was

Held, that the offence (if any) came within the second section of the canon; that anyone charged with such an offence has the right to be tried under section one, by the Diocesan Court, and has the right of appeal to the metropolitan, under section thirteen, and that the bishop had not the power to cancel and annul the license of the plaintiff, either without or for cause, without a trial by the Diocesan Court.

S. H. Blake, Q.C., for the plaintiff.

Walkem, Q.C., for the defendants, the Synod.

IN CHAMBERS.

RINGROSE v. RINGROSE.

Alimony—Settlement of action—Costs—R. S. O. cap. 40, sec. 48.

A reconciliation and return of the wife to the husband is not equivalent to a decree for alimony within the meaning of R. S. O. cap. 40, sec. 48, and does not entitle the wife's solicitors to full costs; *Leonard v. Leonard*, 9 P. R. 450, and *Moore v. Moore*, 4 C. L. T. 404, overruled.

This was an appeal from the Local Judge at Orangeville, who had made an order for payment by the defendant to the plaintiff's solicitors of the plaintiff's full costs of action in an alimony case, which had never gone to trial, but had been settled by a reconciliation, and the return of the wife to live with the husband.

Elgin Myers, for the defendant who appeals. The learned Judge did not consider the question upon its merits, but considered himself bound by the authority of *Leonard v. Leonard*, 9 P. R. 450.

W. H. P. Clement, for the plaintiff's solicitors. *Leonard v. Leonard* was correctly decided, and has since been followed in *Moore v. Moore*, 4 C. L. T. 404.

PROUDFOOT, J., 22nd September, 1884. The provision of R. S. O. cap. 40, sec. 48, is that "In no suit for alimony, in which the plaintiff fails to obtain a decree for alimony, shall any costs be decreed to be paid by the defendant beyond the amount of the cash disbursements properly made by the plaintiff's solicitor." The right to costs in the present case depends wholly upon the provisions of this statute. The English authorities cited in *Leonard v. Leonard* have no application to the present case, as they have no statutory provision in England equivalent to the provision of our Revised Statutes. The whole question was fully discussed in *Keith v. Keith*, 25 Gr. 110, before this Court on re-hearing. In that case I had at the hearing made

a decree for full costs as against the defendant, acting upon the opinion that the consent there given by the husband to receive back and support the wife was equivalent to a decree for alimony within the meaning of that term as used in the statute. That decree was affirmed upon re-hearing, upon the ground that the defendant had accepted and acted upon the decree and was therefore precluded from appealing against it. The late Chancellor dissented from that judgment, upon the ground that a reconciliation and return of the wife to the husband is not equivalent to a decree for alimony within the meaning of that term as used in the statute, and upon this question of the construction of the statute I agree with him, and think that I erred in holding as I did at the hearing in *Keith v. Keith*, that such a reconciliation is equivalent to a decree for alimony. The order should be varied by providing for payment only of the cash disbursements properly made by the plaintiff's solicitors.

(Reported by A. H. Marsh, Esquire, Barrister-at-law).

[OSLER, J.A., 23RD SEPTEMBER, 1884.]

McLAUGHLIN v. CARROLL.

Action for breach of promise—Examination of party before trial.

An action for breach of promise to marry. An order to examine the plaintiff before trial was taken out by the defendant. The Local Judge at Walkerton set aside this order, and the defendant appealed.

OSLER, J.A. held that, as the parties now are competent witnesses under 45 Vict. cap. 10, sec. 3, the order to examine was regular, and allowed the appeal, costs in the cause.

Aylesworth, for the appeal.

W. H. P. Clement, contra.

[30TH APRIL, 1884.]

WELLER v. PROCTOR.

Close of pleadings—Notice of trial—Moving to set aside—Sufficiency of proof for motion.

On the 24th April, the plaintiff delivered a reply with two paragraphs, in the first of which he denied directly certain allegations in the fourth paragraph of the statement of defence, and in the second of which he joined issue upon the remainder of the defence. Notice of trial was served on the same day.

Aylesworth now moved on notice to set aside the notice of trial on the ground of irregularity, in that the same was given prematurely before the pleadings in the action were closed.

Holman, for the plaintiff, contended that it was not negatived in the affidavit filed in support of the motion that no joinder was filed when the notice of trial was given; that so far as the affidavit showed, a joinder might have been put in by the defendant on the 24th of April, and that the first paragraph of the reply was equivalent to a joinder of issue, in that it was a simple denial of an allegation in the statement of defence.

THE MASTER IN CHAMBERS held that the material filed was insufficient to support the motion, and while expressing his opinion that the joinder of issue referred to in Rule 176 was the well recognized form of joinder of issue, and not simply a denial of a previous pleading, dismissed the motion without costs.

[THE MASTER IN CHAMBERS, 26TH SEPTEMBER, 1884.]

McLAREN v. CANADA CENTRAL RAILWAY CO.

Judgment—Interest—Rule 326.

On the 23rd January, 1882, judgment was pronounced in Court by Osler, J., in the following words:—"I direct judgment to be entered for the plaintiff against the within named defendants, after the 5th day of next Hilary Sittings, for \$100,000." Judgment was formally entered with the Clerk of the Court upon the 24th March, 1882, but was dated as of the 23rd January, 1882. Upon a special case submitted for the decision of the Master in Chambers, as to whether interest was to be computed from the 23rd January, or the 24th March,

Held, that Rule 326 does not apply where, as in this case, the judgment itself regulates the entry, and interest must be computed from the time of the actual entry of the judgment. *Keleher v. McGibbon*, 10 P. R. 89, distinguished.

The judgment was amended by causing it to bear date on the day of the actual entry.

W. H. P. Clement, for the plaintiff.

A. H. Marsh, for the defendant.

[30TH SEPTEMBER, 1884.]

CRANDELL v. CRANDELL.

Alimony—Costs against plaintiff.

The plaintiff in an alimony suit registered a certificate of *lis pendens* against the lands of the defendant. Upon the defendant's motion to discharge the *lis pendens*,

THE MASTER IN CHAMBERS made the order, with costs against the plaintiff to be deducted from the payments (if any) to be made, for interim alimony.

Smoke, for the defendant.

Hoyles, for the plaintiff.

CHESSEBROUGH CO. v. RODGER.

Writ of summons—Place of residence of plaintiff—Endorsement thereon.

It is imperative that the place of residence of the plaintiff should be endorsed upon the writ of summons; and a writ without such endorsement and the copy and service thereof will be set aside as irregular.

A motion by defendants to set aside a writ of summons, copy and service thereof for irregularity.

The writ was issued by a firm of solicitors whose address appeared upon the writ. The residence of the plaintiffs was not endorsed thereon, but it was admitted by the plaintiffs on the motion that they resided in the United States.

G. Bell, for the defendants, submitted that the writ was irregular because the residence of the plaintiffs was not endorsed on the writ, and referred to Rules 7 and 43; and Form No. 1, part 1, Appendix A, and contended that the right of the defendants to the *præcipe* order for security for costs was taken away by the irregularity.

Beaumont (Macdougall & Cox) for the plaintiffs, contended that the writ was regular; and that when the address of the plaintiffs' solicitor is endorsed, the place of residence of the plaintiffs need not also be endorsed.

THE MASTER IN CHAMBERS held that the form of writ No. 1 in Appendix A is made imperative by Rule 7, and that the writ was irregular.

Leave was given to amend on payment of costs.

(Reported by George Bell, Esquire, Barrister-at-law).

Assessment Appeal.

THE MIDLAND RAILWAY v. THE VILLAGE OF MIDLAND.

Railway—Assessment—Wharf.

In the railway assessment for the village of Midland, the assessment was divided into four divisions, namely: (i) right of way; (ii) station ground; (iii) vacant land; (iv) the railway wharf and elevator foundation, assessed at \$25,000.

From this last assessment the Railway Company appealed on the following grounds: (i) On the ground that the wharf should not be assessed separately, but as right of way, and that it should be treated as such in arriving at the assessment, which would be, under R.S.O. cap. 180, sec. 26, s-s. 1, the value, according to the average value of land in the locality as rated on the assessment roll of the previous year. (ii) The wharf was superstructure and therefore not assessable.

Y. L. Biggar, for the appellants.

Wm. Steers, for the respondents.

ARDAGH, Co. J.—The wharf was undoubtedly used as a right of way, the railway running their tracks to the very end of it, and as under the statute they are allowed one hundred feet of right of way where found necessary, they were entitled to the full width of the wharf, and I cannot see why there should be any difference between their making the superstructure of wood or of earth. If it had been made of earth the corporation would not have attempted to assess it in any other way, and as the company has made it of wood, I see no reason why it should be dealt with differently from the rest of their roadway. I therefore reduce the assessment to the average value of the land in the locality, with the exception of the part occupied as foundation for the elevator, which I assess at its value under s-s. 2 of sec. 26, R.S.O. cap. 180. Assessment reduced from \$25,000 to \$2,000. See *G. W. R. Co. v. Rouse*, 15 U.C.R. 168; *Toronto v. G. W. R. Co.*, 25 U.C.R. 570.

(Reported by W. N. Ponton, Esquire, Barrister-at-law.)

NEW BRUNSWICK

In the Supreme Court.

[OCTOBER, 1883.]

Doe dem. DORION v. ROE.

Ejectment—Service of declaration—Refusal to open door—Reading declaration to tenant.

Service of a declaration in ejectment was held sufficient, where the door of the house was locked, and the tenant's wife refused to open it, and the officer at a closed window, in the hearing of the wife, read and explained to her the declaration and notice, and then affixed a copy thereof to the door of the house.

Ex parte COUGHLAN.*Ex parte* McDONALD.

Town of Milltown—Police Magistrate—Appointment of—Continuance in office.

The Act incorporating the Town of Milltown authorized the Town Council, at the first meeting after every annual election, or at any subsequent meeting, to appoint a Justice of the Peace to act as Police Magistrate, or to recommend any other person to the Government to be appointed. The Government had on the recommendation of the Council appointed G., who was not a Justice of the Peace, to be Police Magistrate, and in the following year, after the annual election of Councillors, the Council appointed G. for another year.

Held, Weldon, J., dissenting, that whether the appointment by the Town Council was valid or not, G.'s appointment by the Government would continue in force until a new appointment was legally made.

ALWARD v. THE MAYOR, &c., OF ST. JOHN.

False imprisonment—Taxes—Costs of execution—Arrest for, under second execution.

An execution having issued against the plaintiff for non-payment of taxes, he paid the amount of the tax to the Receiver under the Act 24 Vict. cap. 29, but refused to pay the costs of the execution. A second execution was afterwards issued for the costs, under which the plaintiff was arrested.

Held, Weldon, J., dissenting, that the first execution was not satisfied till the costs were paid, and that the second execution was legal.

Ex parte MANZER.

Canada Temperance Act—Prosecution before two Justices—Information.

Where a prosecution is brought before two Justices under sec. 105 of "The Canada Temperance Act, 1878," the information must be laid before both Justices.

Ex parte HAYES.

Canada Temperance Act—Summary conviction—Place of sale—Evidence of.

A summons headed "County of York—Parish of S." required the defendant to appear before a Justice to answer a complaint for illegally selling liquor "in the said Parish." The trial took place in the Parish of S. and a witness proved a sale by the defendant at his shop "in this village."

Held, sufficient evidence of a sale in the Parish of S.

Ex parte TUCKER.

Assessment—"Employment" within meaning of St. John Assessment Act of 1882—Inhabitant of city within—President of a company attending office in St. John.

The President of an Insurance Company resided outside the city of St. John, but attended daily at the company's office in the city, for the purpose of transacting such business as was assigned to that officer, such as signing policies, etc.

Held, that he had an employment within the city within the meaning of "The St. John Assessment Act of 1882," and was liable to be assessed as an inhabitant.

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COMMUNIS ERROR FACIT JUS.

THE decisions of the Judicial Committee of the Privy Council are interesting because they are final, if for no other reason. That they are not beyond criticism has been lately shown.

The above maxim was invoked in *Caldwell v. McLaren* (a) in aid of the respondent, who relied upon the judicial construction of a statute which had been adhered to for a number of years, and on the faith of which he had expended large sums of money. This construction was declared by the Judicial Committee to be wrong, and their Lordships overruled the Canadian cases, and reversed the judgment of the Supreme Court of Canada. The treatment of this maxim by their Lordships makes the subject interesting enough to induce us to examine the authorities as to its true meaning.

The statute in question in *Caldwell v. McLaren*, C. S. U. C. cap. 48, sec. 15, enacted that "All persons may float saw-logs and other timber, rafts and craft down all streams in Upper Canada during the spring, summer and autumn freshets, etc." The plaintiff, McLaren, who was a lumberman, was the owner in fee simple of large tracts of timbered land. A stream, in parts of the bed of which he had the fee, ran through his lands, which, in its natural state, had not the capacity for floating timber at any time of the year. The plaintiff, and those through whom he claimed, spent

(a) L. R. 9 App. Ca. 392.
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large sums of money in making improvements upon the stream and in deepening it, and thereby making it floatable. The defendants, who owned timber limits above that part of the stream in which the plaintiff had the fee, claimed the right under the Act to float their timber down the stream. The plaintiff asked for an injunction to restrain their user of the stream, and relied on *Boale v. Dickson* (b), in which it was held that the fifteenth section of the Act in question referred to such streams only as would, in their natural state, without improvements, during freshets, permit saw-logs, etc., to be floated down them. *Boale v. Dickson* was followed, on the construction of the same statute, in *Whelan v. McLachlan* (c), and approved in *McLaren v. Buck* (d), in the latter of which the plaintiff was the same person as the plaintiff in *McLaren v. Caldwell*, and the stream in question was the same stream. *Boale v. Dickson* was decided in 1863, and the bill in *McLaren v. Caldwell* was filed in 1880. It was argued for the respondent (plaintiff) before the Judicial Committee, that the effect of the decisions upon the construction of the statute in question had been to establish a rule of property law in favour of the respondent, which rule had been acted upon for years, large properties having been acquired and expenditure made on the faith of it. To this the Committee answer, at page 409, "The Judges in the Supreme Court thought that the construction put upon the statute in *Boale v. Dickson* was right, and the Chief Justice, Sir W. Ritchie, thought that, even if wrong, it ought to be maintained on the ground taken by Lord Ellenborough in *Doe d. Otley v. Manning* (e), that, in questions of conveyancing, it was important to adhere to decided cases, even if convinced that they were originally wrong. This doctrine has often been recognised. The maxim '*Communis error facit jus*' is peculiarly applicable to conveyancing questions. But this is not a question of conveyancing, and their Lordships do not think that there is any ground for saying that *Boale v. Dickson*, if wrong, should be followed."

(b) 13 C. P. 337.

(d) 26 C. P. 539.

(c) 16 C. P. 102.

(e) 9 East, 71.

It will be worth while to examine the decisions which touch upon the maxim, with a view to ascertaining how far and in what cases it has been acted upon. One thing is certain, namely, that the maxim has not been exclusively applied to conveyancing cases. Whether it has been misapplied in other cases may be a question for future consideration. If the meaning of the Judicial Committee is that the maxim is exclusively applicable to conveyancing cases, then the question cannot again be raised. If the meaning is that investigation will disclose that conveyancing cases are the only cases in which it has been adopted, then we say that investigation shows the error of that opinion.

Broom's illustration of the maxim is as follows, reference being made to authorities (f) :—"The law so favours the public good that it will in some cases permit a common error to pass for right; as an instance of which may be mentioned the case of common recoveries, which were fictitious proceedings introduced by a kind of *pia fraud* to elude the Statute *de Donis*, and which were at length allowed by the Courts to be a bar to an estate tail, so that these recoveries, however clandestinely introduced, became, by long use and acquiescence, a most common assurance of lands, and were looked upon as the legal mode of conveyance whereby tenant in tail might dispose of his lands and tenements."

If we may criticise so eminent a writer, we should say that in classing common recoveries as "common error" he misinterprets the maxim. Common recoveries belong to a family well known in the history of jurisprudence as Legal Fictions. There was no error or misconception of any sort in these proceedings, nor was there an erroneous, though common, opinion as to their effect. They were thoroughly well understood to be collusive proceedings, taken with judicial sanction, and their effect was intentional, with a defined object and well understood. Their convenience caused them to be finally recognized as a common species of conveyance (g). Littleton speaks of a

(f) Broom, *Leg. Max. ad loc.*

(g) Leith's *Williams*, 31, *et seq.*

common recovery as a "faint action"—"as much to say in English a fained action" (*h*).

Maine, in his treatise on Ancient Law, while dealing with Legal Fictions, speaks of the Fiction of Adoption, by which family relations were permitted to be artificially created, the in-coming population feigning themselves to be descended from the same stock as the people on whom they were engrafted (*i*). Other familiar instances are the fictitious allegations which gave jurisdiction to the Court of Exchequer, and the fictitious plaintiff in ejectment.

In his second chapter, he mentions Legal Fictions, Equity and Legislation as the three agencies whereby Law is brought into harmony with society.

Collusive recoveries are examples of some of the influences which were working to bring about facility in transfer of land, which had their counterpart in the Roman Law. To quote again from Maine (*j*), "Two of the agents of legal amelioration, Fictions and Equity, were assiduously employed by the Roman lawyers to give the practical effects of a mancipation to a tradition, etc." And again (*k*), "I pass by with brief mention another expedient * * which, though it did not immediately make its appearance in English legal history, was of immemorial antiquity in Roman law; * * I speak of the Cessio in Jure, a collusive recovery in a Court of Law of property sought to be conveyed. The plaintiff claimed the subject of this proceeding with the ordinary forms of a litigation; the defendant made default; and the commodity was of course adjudged to the plaintiff. I need scarcely remind the English lawyer that this expedient suggested itself to our forefathers, and produced those famous Fines and Recoveries which did so much to undo the harshest trammels of the feudal land laws. The Roman and English contrivances have very much in common, and illustrate each other most instructively, but there is this difference between them, that the object of the English lawyers was to remove complications already introduced into the title, while the Roman juris-

(*h*) Co. Litt. 361 b.

(*i*) Ancient Law, pp. 130, 131.

(*j*) Ancient Law, p. 278.

(*k*) *Ib.* p. 288.

consults sought to prevent them by substituting a mode of transfer necessarily unimpeachable for one which too often miscarried." It is quite clear from this eminent writer that common recoveries cannot be placed amongst judicial errors which now pass for law, but belong to those legal fictions which were begotten of the necessities of society and did their work in advancing the Law and harmonizing it with the wants of the people.

It will also be abundantly clear, from the decisions which we propose to cite, that the *communis error* of the maxim is in fact an erroneous interpretation of the law which has become so common as to be received by every one as law, and that the policy of the law is not lightly to overturn such an opinion.

It is quite possible, as the Judicial Committee say, that the maxim is peculiarly applicable to conveyancing cases. But it is also certain that it has been invoked and applied in a variety of other cases. We have made an attempt to classify them.

Practice.—In the Institutes (*l*) it is said, "a fine was levied of lands in the County of Carmarthen, and the writ of covenant was *coram justiciariis nostris assise in com' Carmarthen*, and because all the judicial presidents were in that forme ever since the making of the statute, it was adjudged to be good, for *communis error facit jus*."

In *R. v. Justices of Sussex* (*m*), Blackburn, J., said, "I think also that there are cases in which a mistaken notion of the law has, no matter why, become so generally accepted, and been so acted upon as to render it probable that business has been regulated, and the position of parties altered in consequence; and in such cases we may hold that the general acceptance of the mistake has made that law which was originally error: *Communis error facit jus*: but then I think that, before we act upon this principle, we ought to see it clearly made out that the error has been commonly accepted, and that the nature of the case is such that parties are likely to have acted upon the mistake and so

(*l*) 4 Inst. 240.

(*m*) 2 B. & S. at p. 680.

altered their rights and position. I proceed to inquire whether, on these principles, I am now called upon to put a construction on the 4 & 5 Wm. IV. cap. 76, sec. 81, different from that which I think the statute itself bears." His Lordship, after examining the authorities, said, at p. 684, "I have not myself found any grounds for believing that the opinion thrown out in these two cases has been in practice commonly adopted."

In *Janvrin v. De La Mare* (n), the head note, as far as it affects the question, is as follows:—"Where a practice founded on the old Norman Law, though erroneous in its origin, has for a long series of years prevailed in Jersey, with respect to the inadmissibility of the evidence of a witness on the ground of *inimitié*, the Judicial Committee will not alter such practice. *Semle*, such objection, by the old Norman Law, applied only to a Judge, and not to a witness." And, at p. 345 of the report, it is said, "If the practice of the Court, though erroneous in its origin, has prevailed for a long series of years, the Judicial Committee would not lightly alter it."

So, in a Scotch case (o), it was said, "Beyond questions of practice this maxim cannot be extended. Erroneous views of the law, however widely held and acted upon, and even where endorsed by decisions, are no answer to the enforcement of the law when the error has been discovered and clearly ascertained; otherwise an error as to the law or a misconception of it would destroy the law. *Anderson v. McCabe*, 4 Macph. 765." In this case, a common practice of the Court was objected to as erroneous; and one of the officials of the Court having, at the Judge's request, made an investigation, and reported that the obnoxious practice had been universally observed, the Court refused to disturb it, though there was great doubt as to its correctness.

In *R. v. Eriswell* (p), an unsuccessful attempt was made to modify or reverse a rule of evidence, by showing the practice of the Justices at Quarter Sessions. Lord Kenyon

(n) 14 Moo. P. C. 334.

(o) *Beattie's Case*, 8 S. 784.

(p) 3 T. R. at p. 725.

said, "If this were *res integra* I should think it proper to decide this point in favour of the plaintiff; but in addition to the reason of the thing there is the universal practice that has prevailed in the Courts of law. I perfectly well recollect that learned Judge's saying (Foster, J., in *Baldwin v. Blackman*, 1 Bur. 595,) that he had heard that *communis error facit jus*, but he hoped he should never hear that rule insisted upon to set up a misconception of the law in destruction of the law." This case is explained in *Smith v. Edge* (q), where the same learned Judge said, "With regard to the case of *R. v. Eriswell*, which has been mentioned, we were there pressed with a supposed usage at some of the Quarter Sessions to admit that as evidence which is not warranted by the rules of evidence; and when the propriety of that usage came to be discussed, I thought it required correction."

In *Waltham v. Sparkes* (r), we read the following:—"3. They took exception to replication [that two Justices made an order on the parish to allow 25s. a week for a pauper] that the Justices of Peace out of Sessions could not make an order for an express sum for the maintenance of a poor man, but they agreed that they might sign a rate made by the parishioners. But to this the Court answered, that all the justices of peace in England did so, and therefore, though they have not authority to do it in strictness of law, yet *communis error facit jus*."

Conveyancing Cases.—The maxim has frequently been applied to the practice of conveyancing and the construction of instruments, and the recollection will readily turn to the expressions of Judges who have refused to overturn the well understood practice of conveyancers upon which many titles depend. *Isherwood v. Oldknow* (s) was an action on a covenant in a lease under a power. In that case it was said, "It has been sometimes said *communis error facit jus*; but I say *communis opinio* is evidence of what the law is; not when it is an opinion merely specu-

(q) 6 T. R. at p. 564.

(r) 1 Ld. Raym. 42.

(s) 3 M. & S. at p. 396.

lative and theoretical, floating in the minds of persons, but when it has been made the ground-work and substratum of practice upon which powers of this sort have been erected and acted upon from the time of 32 H. 8 down to the present time; all of which have been framed under the supposition that the various covenants which the author of the power prescribed were capable of being enforced. For what purpose can we suppose that persons conversant in drawing wills and family settlements have gone on prescribing these terms, where no one term, and no one covenant, except that for payment of rent, could be enforced. As to the covenants for repairs and for the management of the estate, and everything collateral to the payment of rent, all these would be nullities so far as the action of covenant is concerned; and nothing could remain except the remedy by distress or debt for the rent. Can we imagine that these learned persons should, for so long a series of years, treat nullities as realities and as having vital operation? And yet all this we are desired to adopt. * * It is too much, therefore, for us, at this time of day, to pronounce that all which has hitherto been esteemed and done as valid, has been error."

In *Phipps v. Ackers* (t), Lord Brougham said, "As I really had not expressed any opinion on this point, and only stated the doubt and difficulty which had seemed to hang over it, I am not prepared to recommend that your Lordships should differ from the learned Judges, and should declare the law to be erroneously laid down in a decision which has for the last thirty years been unquestioned, and must in a great number of instances have been acted upon." And again, at page 598, "We may now assume that whatever differences exist in these cases, and whatever might have been our opinion of them before the extreme application of them made in *Doe v. Moore* (14 East, 601), the principle there sanctioned having been for so many years adopted by acquiescence, no course ought now to be taken which can break in upon it. It is of the most essen-

(t) 9 Cl. & Fin. 596.

tial consequence that the doctrines which have been long received for law and acted upon by the Courts in their decisions, and by parties and their professional advisers in the disposition of property, should not be shaken. The Courts, and even this House, have frequently proceeded upon this principle, and have sanctioned what even plainly appeared to be erroneous principles, introduced and long assumed as law, rather than occasion the great inconvenience which must arise from correcting the common error and recurring to more accurate views. Accordingly, when *Cadell v. Palmer* (1 Cl. & Fin. 372; S. C. 10 Bing. 140, and 8 Bligh, 564) was argued in this House, I advised that your Lordships should abide by the received extension which had for a great length of time been given to the period within which an executory devise might be held good, as not falling within the rule against perpetuities. In disposing of that case, however, my argument went expressly upon this view,—while I showed, I think clearly, that the doctrine of twenty-one years and some months had originated in a manifest error originally arising from the period at which a recovery could be suffered to bar remainders. That argument I, however, perceive has not been reported." See also *Jones v. Tapling*, *infra*, touching Ancient Lights.

Usage.—In *Feather v. Reginam* (u) it appeared that the suppliant had spent time and money in perfecting and patenting certain inventions in shipbuilding. It was the usage of the departments of State to remunerate inventors for the use of their patented articles by the Crown, though by statute the Crown was at liberty to use them without remuneration. The suppliant expected that his invention would be adopted for use in the navy, and that he would be remunerated in the usual way, and with that object in view he perfected and patented his inventions. The Crown made use of the inventions without remuneration. Hence the petition. The maxim was relied upon by the suppliant. At page 290 of the report it is said, "Assuming, according

(u) 6 B. & S. 257.

to the proposition relied on, that where there has been an exposition of the law by judicial decision, or a settled course of practice or understanding of the law among legal practitioners, the language of an instrument may, in certain cases, be interpreted according to such a standard, we have in the present instance nothing amounting to those conditions. All that is shown is that a practice has grown up—at what period does not distinctly appear—on the part of the servants of the Crown, of not insisting on the rights of the Crown to use patented inventions without remuneration to the patentees. * * Considerations of public convenience having now, as the Attorney-General informs us, led the heads of the public departments to insist on the application of a stricter rule as regards the rights of the Crown, though one's sense of justice may be shocked at the retrospective application of this doctrine to a patent taken out when a different practice and understanding prevailed, we cannot, when called on to interpret this patent according to the legal effect of its terms, do otherwise than deal with it according to the rules and principles that would have been applicable to it had such a practice never arisen."

Trover.—*Garland v. Carlisle*-(v) was an action of trover against a sheriff for seizing and selling the goods of a bankrupt before the issue of a commission in bankruptcy but after an act of bankruptcy had been committed. The majority of the Judges in the Exchequer Chamber held that the action would lie, affirming the judgment of the Court below, following a certain line of decisions. Several eminent Judges dissented. The remarks of Vaughan, B., who dissented, best show the position assumed. He said, after reviewing the cases, "In all these cases, therefore, the Judges profess to have squared their decisions by the rule laid down by Lord Mansfield in *Cooper v. Chitty*. But, in justice to the memory of that great man, I am bound to observe, that his masterly judgment cannot, without the abuse of language, bear the construction put upon it. I am aware that of late years this has been a prevalent

opinion in some of the Superior Courts of Westminster Hall, and it may be said, *communis error facit jus*; but unless I am tied and bound by the imperative language of an Act of Parliament, or by a series of authorities running in one clear and undisturbed current, I will never consent to subject a public officer to the injustice which such a decision must of necessity inflict upon him."

Ancient lights.—*Jones v. Tapling (w)* was a case respecting ancient lights. Blackburn, J., said, "It has been said that, right or wrong, the case of *Renshaw v. Bean* (18 Q. B. 112) has been decided, and that we should not unsettle the law. I think, if we acted on this principle, we should be abandoning the proper functions of a Court of Error. There are cases in which a decision, originally erroneous, has been so long acquiesced in and acted on that a return to the proper principle would greatly affect existing interests. This is peculiarly the case in questions of conveyancing law. There the maxim applies, *communis error facit jus*. But when we find a modern decision which has been questioned at once, and has led to much litigation, we ought as it seems to me, in a Court of Error, to inquire whether it is consistent with principle, and if we think it wrong to overrule it. It has been forcibly observed by an American author of repute, (Phillips on Insurance, 393, n) that, to do otherwise, 'tends to reduce jurisprudence from a science to an aggregation of dogmas.'"

And in the same case in the House of Lords (x) Lord Cranworth said, "It is, however, the duty of this House, as the ultimate Court of Appeal, to lay down the law on what are considered to be correct principles, and though we should be slow to decide contrary to the decisions of the Courts of Westminster Hall, where they have been long received and acted on, even if we see cause to question the grounds on which they were supposed to rest, yet no such principle ought to restrain us from correcting what we deem to have been an erroneous decision pronounced only thirteen years ago; more especially when we have, as in

(w) 12 C. B. N. S. at p. 846.

(x) 11 H. L. C. 290, at p. 315.

this case the opinions of two very learned Judges expressing their decided dissent from it, and when we think we can discover in the judgments of the Chief Justice of the Common Pleas and of Mr. Justice Williams great doubts, to put it no higher, of the soundness of the decision which we are overruling."

Partnership.—In *Devaynes v. Noble* (y) it was held that a creditor of a partnership, of which one of the partners dies, and the surviving partners afterwards become bankrupt, has a right to resort to assets of the deceased partner for payment without regard to the state of the account between such deceased partner and the surviving partners, Lord Brougham, L.C., in speaking of the equity invoked, said, "It is not upon slight grounds, certainly, that any Court, either of law or of equity, ought to loosen and unsettle that which has stood for so long a period as nineteen years. If it be true that even a prevailing error,—what has been called a common or universal error,—may be said to make the law, this at least may be allowed to be a sound foundation of the doctrine I am referring to, namely, that unless a great and manifest deviation from principle shall have been committed, it may create much further mischief to reverse one individual case by way of correcting a slight error, if that error has been acted upon for a long series of years, than to leave it as it stands; more especially, if the opinion of lawyers and the decisions of Judges have been ruled by it, and if upon the analogies of that case, the same principle has been recognized and adopted in other cases connected with and relating to it."

Construction of Statute.—In addition to the case of *Caldwell v. McLaren*, and those which we have already cited on the construction of the Upper Canada Statute which gave rise to *Caldwell v. McLaren*, we may refer to two others. *Frazer v. Ehrensperger* (z) was an application for payment of a sum awarded by an arbitrator. The authority of the arbitrator had been revoked by the opposing party, and the question arose whether the power of

(y) 2 R. & My. at p. 506.

(z) L. R. 12 Q. B. D. at p. 318

revocation existed. The Common Law Procedure Act and other statutes came up for construction to some extent. Brett, M.R., said, "We were referred to s. 7 [of the C. L. P. Act, 1854], and it is said that that incorporates s. 39 of 3 & 4 Wm. 4, c. 42, and that therefore there is an enactment which prevents either of the parties revoking the submission to arbitration, and in support of this contention the judgment of Bovill, C.J., in *Re Rouse and Meier*, L. R. 6 C. P. 212, at p. 216, was relied on. The decision of the majority of the Court in that case is against the appellants in the present case. We have, it is true, the power of reviewing that decision; but where there is a decision as that is on the course of procedure which has been made more than twelve years ago, and which therefore must necessarily have been frequently acted on during that time, and no one has gone to the Legislature to have it altered, this Court of Appeal, even if it differed from such decision, would not now be disposed to overrule it."

The Earl of Waterford's claim (a) was a peerage case. Lord Cottenham, L.C., said, "It has been admitted by Counsel for the Crown, that if this was now the first time that an interpretation was to be put upon this Act of Parliament, there could be no doubt entertained as to what should be the construction. But our attention has been called to the venerable authority of Lord Coke, and two other Chief Judges of England, who had reference made to them from the Privy Council, and who appear to have considered this matter and to have stated, that having heard the case argued by Counsel in behalf of the Earl, they having taken great consideration and advisement, and after they had read the preamble and all the Act of 28 Henry VIII., had unanimously resolved upon the construction which has been made the subject of argument at your Lordship's bar. It is impossible to deny that their opinion thus expressed throws a great difficulty in the way of that construction which we should otherwise at once put upon this Act. It

(a) 6 Cl. & Fin. at p. 171.

cannot be denied that in some cases the plain meaning of an Act of Parliament has been changed by a course of judicial decisions, each going a little and a little further, so that at length the Courts have adopted a construction widely different from that which would, but for such interpretations, have been put upon the plain intent of the words. In all such cases you are to take into consideration, not merely the words of the Act of Parliament, but the decisions on them, which may be said to have been all but imported into the words of the Act, so that the Act is to be construed with reference to such decisions. But I am not aware of any case, in which a single decision, even of a Court of competent jurisdiction, having before it properly and judicially the matter on which it was pronouncing a judicial decision, has been held to operate so upon the plain meaning of a statute. There has been a course of decisions, and where the decision first made has been adhered to and confirmed by other decisions, and that is what is called a current of authorities too strong to be resisted ; besides this, that in those cases the decisions were all judicial. A mere *obiter dictum* is very inferior to the decision of the same Judges or the same Court, where all the matters are brought before them, and they are required judicially to decide. But this is not even an *obiter dictum* ; for it is the opinion of those three Judges on a point referred to them, and on which they were called upon to advise his Majesty in Council, but not, strictly speaking, in their judicial character, deciding this as a question brought regularly before them, and in which their judgment was to operate on the rights of the parties. Undoubtedly, with the opinion of so great a lawyer as Lord Coke upon the subject, one cannot help distrusting his own, if it happen to differ from that of so great a Judge ; but where the reasons for the opinion expressed are also given in the report, it is the bounden duty of those who are called upon to review that opinion, to investigate those reasons, and to see how far the opinion is borne out by them, and by any case which is referred to. [Remarks upon the case in judgment.] My Lords, if this opinion of the Judges had been sanctioned by other decisions ;

if it had been discussed in the proper tribunal in which it had been sought to be acted upon, and had been there adopted, I mean in Parliament, then undoubtedly the same principle would apply to it as to a judicial construction upon a legislative enactment, to which it had reference; but it does not appear that that was the case, because it is perfectly clear that the House of Lords in Ireland, the proper tribunal, did not act upon that authority; we are not aware whether this opinion was cited there; in the absence of any evidence to the contrary, we must conclude that it was known to that House at the time that Francis the Eleventh Earl was admitted to his proxy."

And in the case of *Joyce v. Hart* (b) in the Supreme Court of Canada, Richards, C.J., said, "The general rule is, when the words of a statute have received a judicial interpretation, and the Legislature subsequently passes an Act on the same or a similar subject, using the same words, then you hold that the Legislature approved of the meaning affixed to the words by the judicial decision."

Criminal Cases.—The celebrated case of *O'Connell v. Regnam* (c) brought into question the applicability of universal opinion to criminal law. The opinions of the Judges were asked by the House of Lords, and the universal understanding of the Profession was certified to the House by the Judges of England. The House rejected the opinion on a division against a determined protest. Lord Brougham said, "The highest Court is bound to view with the utmost respect the practice and the decisions, and the precedents in the Courts below, as evidence of the law which we as well as these Courts administer; and only to overrule their decisions when we find it clear, beyond all doubt, that they have mistaken the law. * * But their own opinion must be quite clear that the error has been committed. Else a uniform course must, generally speaking, be admitted to make the law to us, as well as to the Courts below."

The first result of our researches is that the maxim is not applied exclusively to conveyancing cases. What then

(b) 1 S. C. R. at p. 328.

(c) 11 Cl. & Fin. 372.

is the meaning of the Judicial Committee when they say that to such cases it is peculiarly applicable? Because it was peculiarly applicable to such cases their Lordships refused to apply it to a case of property law of which the practice of conveyancing is only a branch, and that perhaps a subordinate one. Does not this mean that it is exclusively, not only peculiarly, applicable to conveyancing cases? Whether that is the true meaning of the judgment or not that is its result. Is there any reason for making it peculiarly or exclusively applicable to conveyancing cases? The reason for its application to such cases is that the title to property should not be shaken by throwing doubts upon commonly received doctrines of law. It is a satisfaction to the public to know that they shall not be divested of property acquired on the faith of accepted doctrines of conveyancing law by a reversal of those doctrines. But is it any satisfaction to them to know that they may be divested of property acquired on the faith of accepted doctrines of other branches of law, by a reversal of long accepted judicial decisions?

Recurring now to *Janvrin v. De La Mare*, supra, we find their Lordships' predecessors applying the maxim to a most important rule of evidence, which excluded certain witnesses from giving evidence, when, in fact, the true rule, in their Lordships' opinion, only applied to a prohibition to a Judge and not to a witness. Compare, now, the two cases, *Caldwell v. McLaren* and *Janvrin v. De La Mare*. In the latter case, to have disregarded the maxim would have been to enfranchise a cloud of witnesses, to have removed restrictions, the like of which are daily giving way before legislative enactments. But the maxim was adhered to. In the former case, to have adhered to the maxim would have been to have confirmed the respondent in his title to valuable property, in which he invested his money on the faith of a construction of a statute, which for some years received the assent of many Judges, and which in the case itself received the assent of the majority of the Canadian Judges before whom the case was argued. The disregard of the

maxim threw open to the public as a highway what had been for years considered and enjoyed as private property. Possibly, one departure from precedent may entitle their Lordships at a future period to free themselves from the trammels of the dictum in *Caldwell v. McLaren*, and enable them to say, what the books show, that the maxim is not peculiarly applicable to conveyancing cases, but has in fact been applied, and is therefore applicable, to many other branches of our law; that it is in fact the result of the peculiar system of our law which relies solely upon common or universal, and very often unexpressed, opinion for the exposition of many of its doctrines. It was said in *O'Connell v. Reginam* (d), "It is said there has been no express decision upon the point in controversy; it is now for the first time presented for adjudication; it cannot, therefore, be considered as settled. If a question then be so clear, so well established, that no person, whether attorney, counsel, or Judge, never entertained a doubt respecting it; if it has been uniformly acted upon and constantly recognized; is it to be said, because it has not been the subject of express decision, that it is therefore not to be considered as part of the settled law of the land? The argument would lead to this singular conclusion, that the more free from doubt any point might be considered by the Profession, the more uncertain it would become, because it would be less likely to be called in question, and less likely, therefore, to become the subject of any express decision. For many of the doctrines and principles which form part of the acknowledged law of the land, you would look in vain for any direct decision. Usage, admitted practice, recognition, are evidence of what the law is."

How then can we accept the narrow and cramped application of the maxim which the Judicial Committee have lately made of it? In practice cases its application is apparently universal. This is matter of small moment, as the Courts have such wide power over their own machinery. In conveyancing cases there is no dispute as

(d) *Supra*, at p. 321 of the report.

to its applicability, though Lord Brougham appeared to have one case to lament (*e*). The usage of the departments of State has been invoked, but not given effect to, though the retrospective application of the decision shocked the Court's sense of justice (*f*). The Court in that case, however, admitted the principle of the maxim, but denied the presence of conditions for its application. In *trover*, the maxim was applied, *Vaughan, B.*, protesting against its harshness in the case before the Court, and refusing to agree with the majority (*g*). In a property case, *Jones v. Tipling*, *supra*, the conditions for its application were not present, but one case having been decided contrary to the decision of the Exchequer Chamber. The Court very plainly admits the maxim and its policy. It is needless to recount all the cases, not being conveyancing cases, in which it has been applied.

It is evident from a perusal of these cases that all are agreed upon this, that a single instance, one decision, of mature age, will not avail; neither will a speculative and theoretical opinion prevalent in the Profession; nor an usage or custom clearly against law, and not being an usage or custom founded upon judicial decision or practice. But if one decision be acted on for a number of years (*h*), or an error be so long acquiesced in and acted upon that a return to the proper principle would greatly affect existing interests (*i*), or if the opinions of lawyers and the decisions of Judges have been ruled by an erroneous principle (*j*), or if after a construction, though erroneous, put upon a statute by judicial decision, the Legislature re-enacts the statute, or passes another Act on the same subject, using the same words (*k*), the erroneous principle in each case must be accepted as the law.

(*e*) See his Lordship's remarks in *Phipps v. Ackers*, *supra*, at p. 513.

(*f*) *Feather v. Reginam*, *supra*.

(*g*) *Garland v. Carlisle*, *supra*.

(*h*) *Phipps v. Ackers*, *supra*.

(*i*) *Jones v. Tipling*, *supra*.

(*j*) *Devaynes v. Noble*, *supra*.

(*k*) *Joyce v. Hart*, *supra*.

The answer that to abide by an erroneous principle is to set up misconception of the law in destruction of the law, involves a *petitio principii*. What is the law? How can it be ascertained? Coke, in his note to Littleton's phrase, "It is commonly said," remarks, "That is, it is the common opinion, and *communis opinio* is of good authorities in law" (l); and again, at another place, "Here, by the opinion of Littleton, *communis opinio* is of authorities, and stands with the rule of law, a *communi observantia non est recedendum*" (m). *Communis opinio* must of necessity be evidence of what the law is, otherwise there would be no other way of arriving at it but by adopting the arbitrary decision of a final Court of appeal. Such a Court has of course the power even to make the law, but is not endowed with any special faculty of knowing what the law is, if it is not the *communis opinio* of the lawyers. Where, therefore, it is said, merely, that to set up a misconception of the law is to destroy the law, we are not directed to any infallible source from which we may ascertain which is the misconception and which is the law.

The result is, we must admit, somewhat barren. It seems to be an open question in each case whether the decision or decisions relied on, being erroneous in the opinion of an appellate Court, have been so acted upon or relied on, or so accepted as the law, that to correct the supposed error would interfere with existing rights. And in most cases this must be matter of pure speculation. And when the decision of a final Court of Appeal is against a current of authority, or against the universal opinion of the Profession, it leaves the law in a more unsatisfactory state than before, even admitting the error, because it is the opinion of a few against the opinion of many. Some one said that it would have made not a particle of difference if every case in Meeson and Welby's reports had been decided the other way. And perhaps he was right. As long as we know the law we can adhere to it. We can only know it by gathering together a multitude of precedents and extracting from

(l) Co. Litt. 186 a.

(m) Co. Litt. 346 b.

them such doctrines as are common to all, or may be supported by the majority of them—the weight of authority. But in advising a client it may always be necessary to tell him that our knowledge is qualified, that though the law, as at present interpreted, is in his favour, if he has a wealthy opponent he may in the end find it against him (n).

(n) Since writing the above the October number of the Law Reports, Q. B. Division, has come to hand, containing a case of *Regina v. Edwards*, in which some pertinent remarks will be found, at pages 590, 591, 593 and 595.

THE JUDGMENT AND ITS WRONGS.*

(*Per Cur.*)

I wrote a judgment without much care;
It was unsound, they said, somewhere;
For who has ears so big and long
As not to know Courts may go wrong?

Appealed from Court to Court—reversed
Three times—the suitors wept and cursed,
For bills of costs, in its wayward flight,
Piled up like snow on a winter's night.

Long, long afterward (what a joke!)
The Privy Council the silence broke;
And at last my judgment found a friend,
For they held it right from beginning to end.

* Somewhat successfully imitated by Longfellow in "The Arrow and the Song."

EDITORIAL REVIEW.

Speedy Foreclosure.

The practice of giving one day to all incumbrancers to redeem mortgaged property seems to be now the established practice in England. In *Bartlett v. Rees*, L. R. 12 Eq. 395, the Court fixed a day certain for all subsequent incumbrancers to redeem or be foreclosed, leaving the defendants to settle priorities amongst themselves, no question of priority affecting the plaintiff. This case was followed directly in *General Credit and Discount Co. v. Glagg*, L. R. 22 Ch. D. 549, where Bacon, V.-C., made a decree for foreclosure fixing one period of six months for all the mortgagee defendants to redeem or be foreclosed, without prejudice to their rights *inter se*. *Smith v. Olding*, L. R. 25 Ch. D. 462, was apparently the next reported case, and a similar judgment was granted. To this case there is a note of an unreported case of *Sweet v. Combley*, in which Fry, J., refused in the absence of the mortgagor to depart from the usual rule, but in the principal case, *Smith v. Olding*, the defendants were unrepresented, though duly served with notice of the motion for the judgment sought. The latest decision is *Mutual Life Assurance Society v. Langley*, L. R. 26 Ch. D. 686, where Pearson, J., declared himself in favour of fixing, as a general rule, one period for redemption.

The period for redemption might with advantage be made shorter still.

The process of foreclosure is a long and wearisome one, and the inordinately long time given to the mortgagor is of little benefit to him. If the estate is worth redeeming the sooner it is done in most cases the better for the mortgagor. If he has to borrow in order to redeem, he will have less to pay and therefore less to borrow, if the subsequent interest

were computed for a shorter period. If the estate is not worth redeeming it is a positive injustice to the mortgagee to keep him longer out of his absolute title. The mortgagor by contract usually makes the estate saleable under a power of sale upon short notice, and should not complain if his equity to redeem were limited to three instead of six months. It is true that he does not lose his whole estate by sale. If it is unsaleable it will not sell; if worth more than the mortgage debt he has the benefit of the balance. But the answer to that is, that if the estate is worth saving he will most probably be forced to redeem within several weeks in order to save it from sale; if not worth saving he suffers no loss. Dealing in land is more brisk than formerly, and it passes from owner to owner, and we may add from mortgagee to mortgagee, more freely. Loan Companies are numerous and competition amongst investors is keen, and a mortgagor's facilities for borrowing money are rather greater than those of the mortgagee for recovering it.

The American Law Review on Canada.

One has to go from home in order to hear the news. The *American Law Review* tells us that Colonial barristers have been lately allowed to appear in the Courts of Westminster Hall, upon the same footing with English barristers; and continues, "The English profession appear to be somewhat exercised over the matter, fearing as they do the effect of this new competition; but for the most part they seem to have concluded to submit to the inevitable with the best grace possible." We have often heard of very excellent lawyers being very bad judges of fact, and this is but another instance of it. Both English and Colonial barristers will enjoy the humour of this piece of news.

A few facts of a similar kind are appended, in order to show the disadvantages which Canadians are under, and the advantages which would, of course, accrue to them if Canada were annexed to the United States. For instance, "It will be a cold day in England when any of the British Colonies gives to England a Lord Chancellor, or even a colonel of Dragoons. * * Within the memory of the pre-

sent generation no Canadian has attained to important rank in the British Army." The present generation (of Canadians) will recollect "the Hero of Kars," Sir John Inglis, Lt. Col. Dunn, and perhaps others, as distinguished officers of the British army, and Lt.-Col. Denison as the author of a famous work on cavalry.

And, moreover, as surely as the *Review's* information respecting the Bar is correct, so surely will "the effect of this new competition" produce from Canada a Lord Chancellor for England.

The *Review* is also under the impression, apparently, that Canada is composed of four provinces, and that the best places in Canada are filled by Englishmen foisted upon the Canadians by imperial influence. One would imagine that the imperial influence which could not keep the Canadian Bar out of England, would not be very potent in providing places for Englishmen in Canada. There is a want of cohesion and logical sequence displayed in the statement of the wrongs of Canada and the bloodless victory of her Bar in England, that will prevent the learned writer both from taking his place amongst the Masters of Fiction, and from acquiring distinction as a newswriter. Another and a longer visit to Canada would greatly ease the learned gentleman's mind on the subject of her wrongs.

Judgments under Rule 324.

The union and consolidation of the Courts have not produced uniformity of practice. In *Brayley v. Buchan* (not reported), Mr. Justice Proudfoot, in ordering judgment under Rule 324, refused to leave other creditors to their remedies, if any, under the Creditors' Relief Act, and to omit the ordinary limitation as to other creditors who should obtain executions within a limited time, sharing in the results of the applicant's execution. In *Forrestal v. Fellowes* (not reported), Mr. Justice Cameron refused to allow this limitation to be inserted in the order for judgment, though asked to do so by counsel for the defendant, preferring to leave other creditors to their remedies under the Creditors' Relief Act. It would be worth while for the judges of the Supreme

Court of Judicature to make some definite ruling upon this practice in order that one may know what to expect, on this point, as the result of such applications.

Montreal Law Reports.

The Legal News announces that, in connection therewith there will shortly be published two series of reports, one containing reports of cases decided in the Superior Court and Court of Review, the other containing reports of cases decided in the Queen's Bench. Each series will be issued in monthly parts, and the *Legal News* will be issued weekly as heretofore.

Hitherto, we believe, the reporting in Montreal has been done without much method, as far as the publication of reports was concerned, the profession depending on several independent publications. The reporting strength is now to be concentrated upon a single publication. We congratulate the learned Editor of the *Legal News* upon the project, which, we believe, is due to his energy and ability.

CORRESPONDENCE.

Fraudulent Preferences.

To the Editor of the Canadian Law Times :

SIR,—Through the columns of the CANADIAN LAW TIMES let me call the attention of our Local Legislature to the existing state of the law with reference to fraudulent preferences and the doctrine of pressure.

By section 2 of cap. 118, R. S. O., “ In case any person, being at the time in insolvent circumstances or unable to pay his debts in full * * * makes or causes to be made any gift, conveyance, assignment or transfer of any of his goods, chattels or effects * * * *with intent* to defeat or delay the creditors of such person, or *with intent* to give one or more of the creditors of such person a preference over his other creditors, or over any one or more of such creditors, every such gift, conveyance, assignment, transfer or delivery shall be null and void.” With a view to amend the above, cap. 10, sec. 3, of 47 Vict. (Ontario), was passed, which enacts as follows:—“ Section 2, cap. 118 of the R. S. O. is hereby amended by inserting before the words ‘ every such gift ’ in said section, the words ‘ whereby such one or more of the creditors of such persons would obtain a preference over his other creditors or over any one or more of such creditors.’ ”

At first sight it appears that the above amendment has the desired effect of making the fact of a preference having been obtained by one or more of the creditors the test as to whether or not the assignment by which such preference has been obtained should stand, or be set aside at the instance of another creditor, or other creditors not so preferred : and that, too, notwithstanding such assignment be made without *intent* to prefer ; but such is really not the

case, and when the original Act and the amending Act are read together it becomes apparent that the later Act has practically no effect whatever.

At the risk of being tedious, I transcribe portions of the two Acts, that we may more plainly see their meaning when placed in proper sequence as follows :—"In case any person * * * makes or causes to be made any gift, conveyance, assignment or transfer * * * of any of his goods, chattels or effects * * * *with intent to defeat* or delay the creditors of such person, or *with intent to give* one or more of the creditors of such person a preference over his other creditors or over any one or more of such creditors whereby such one or more of the creditors of such persons would obtain a preference over his other creditors, or over any one or more of such creditors, every such gift, conveyance, assignment, transfer or delivery * * * shall be null and void as against the creditors of such person."

From the Acts read together, as above, it is apparent that now, as formerly, if the intention to prefer is wanting the preferential assignment may still be perfectly good, as was the law under the earlier Act. Had the word "or" been placed before the word "whereby" in the amending Act it would have been otherwise.

It has frequently been decided that assignments are not *voluntary*, and that *the intention to prefer* does not exist under the statute when the assignment is made in pursuance of a request from the assignee; see *Whitney v. Toby*, 6 O. R. 56, and the cases there collected; and consequently, since the absence of *intention to prefer* may render the assignment perfectly good, notwithstanding the Act of last session, the doctrine of pressure remains as it was under the earlier Act, and that of last session is practically a nullity.

C. L. FERGUSON.

REVIEW OF EXCHANGES.

Central Law Journal.—23rd May, 1884.

"Reasonable Doubt" in Inanity, by FRANCIS WHARTON. Opinions delivered in the New York Courts are quoted from to show that the authorities upon the subject of the burden of proof in insanity are, in that State, far from being harmonious. It is not necessary, in order to justify an acquittal on the ground of insanity, upon a criminal charge, that insanity should be proved beyond a reasonable doubt. The generally approved doctrine is that, in such cases, there should be a preponderance of proof of such insanity.

Voidable Sales—Fraud of Vendee, by CHARLES R. MILLER. Three conditions are necessary to constitute fraud which will render a sale voidable, (i) Dishonest, wilful or intentional acts which involve either a legal or equitable duty. These may be acts of omission or concealment. (ii) The means employed must be successful in deceiving. (iii) There must be an undue or unconscientious advantage taken of the party deceived. If the vendee makes false representations, or even random statements not positively known to be false, and by such means obtains the goods, the purchase is fraudulent and voidable. But the statements must be such as are calculated to deceive a person of ordinary prudence. If the vendee obtains the goods upon the representations of a third person, he is responsible for such representations as much as if he made them himself, if the representations are made with the intent that they shall be communicated to the vendor and thus influence his conduct. The representations must be such as are relied on by the vendor as an inducement to make the sale, and in the absence of evidence to the contrary, the presumption will be that they were so relied on. If no enquiries are made, mere silence will not amount to fraudulent concealment; but this rule does not hold where a vendee of former good financial standing has recently suffered the loss of all his property, or has made an assignment; here he is bound to inform the vendor of the facts, and his silence would be fraudulent. On discovery of the fraud the vendor, unless he have waived his right, may rescind the sale and repossess himself of the goods if found in the possession of the vendee or his assignee for creditors, even if, delivered as raw material, they are already worked up into manufactured products. The assignee for creditors has no greater rights than the debtor, nor has an attaching creditor; nor will the consideration of an existing debt render the transfer of the debtor a *bona fide* purchase for value, as against the unpaid vendor. Very numerous cases support these propositions.

Ibid.—30th May, 1884.

Baggage and Its Delivery to the Carrier, by ADELBERT HAMILTON. A very interesting digest of the cases, English and American, upon this subject.

Malicious Act gives no Right of Action, by EUGENE MCQUILIN. An act which does not amount to a legal wrong affords no ground of relief, no matter how great is the malice which prompted it. Extracts are given from cases illustrating this doctrine. "In the practical application of the rule the test always is, Was the act which caused the injury legal, or, if illegal, was it followed by damages? and not, was it caused by malice? If it is legal, or if illegal and no damages result, no action can be maintained, however maliciously it may have been done."

Ibid.—6th June, 1884.

Breach of Promise, by ELISHA GREENHOOD. The subject is treated under the following heads:—The Action; The Promise; Breach; Defences; Damages; Aggravation of Damages; Mitigation of Damages. To prove the contract, an express promise need not be shown; it may be inferred from letters, habits, and expressions; but there must be proof of conduct which is unusual with persons between whom no such relation exists. Mutual promises must have been made, but the plaintiff's promise may be inferred from her acts. A general promise to marry is construed as one to marry within a reasonable time, and after the lapse of such time the Statute of Limitations begins to run. If not to be performed within a year, the contract comes within the purview of the Statute of Frauds, but is not otherwise affected by that statute where it avoids all verbal contracts made in consideration of marriage. Under certain circumstances the Court will hold the contract void, as against public policy. The jury are the sole judges of the measure of damages, and their verdict will seldom be disturbed.

Ibid.—13th June, 1884.

Covenants or Conditions, by GEO. W. WARVELLE. The continued toleration of conditional estates in land, which are an inheritance from the feudal law, is deprecated, as inappropriate to the circumstances surrounding social life in a new country. The operation and effect of special recitals, conditions and covenants in conveyances of land are then treated of at length.

Wife's Agency for Husband during his Absence from Home, by DAVID STEWART. Generally, a wife left in charge of her husband's house, his business or his property, has, as his agent, such powers with respect thereto as other persons in such positions of trust usually exercise. If his absence is long, her powers are more extensive. She may employ labourers for his farm; she may repair his property and incur expense to preserve it; she may employ counsel to protect his rights; she may carry on his business in the usual way, but may not make contracts out of its ordinary course. She cannot sell his property, unless this is necessary to procure her support, or that of her children. In other cases the ordinary rules of agency may generally be said to apply.

Ibid.—20th June, 1884.

Contracts of Carriers limiting Liability for Negligence to a Specified Sum. ANONYMOUS. "If a person voluntarily represents and agrees that the goods delivered to a carrier are of a certain value, and the carrier is thereby induced to grant him a reduced rate of compensation for the carriage, such person ought to be bound by his representation and agreement; otherwise he imposes upon the carrier the obligation of a contract different from that into which he had entered." Where the valuation is inserted in pursuance of some regulation of the carrier, and without reference to the real value of the thing to be transported, or the shipper has been forced to agree to a false valuation in order to avoid paying an exorbitant rate of freight, such stipulations will be condemned by the Courts.

Rescission of Contract—Return of Consideration, by CROSBY JOHNSON. The cases treated of are those where the contracts of infants, lunatics, defrauded persons and persons acting under mistake are sought to be set aside; and the rule as to the necessity for a return of the consideration as a condition precedent to relief in each case, is considered. An infant is not bound to place the other party *in statu quo*; a lunatic stands in the same position, if the party dealing with him knew him to be such, but if he did not and had no ground to suspect his lunacy, and the contract was not oppressive, there the consideration must be returned. A defrauded person must tender return of the consideration, save where it is entirely worthless. The rule is most strict in cases of mistake, where the party seeking relief must put the other party *in statu quo* as a condition to obtaining relief.

Criminal Law Magazine.—July, 1884.

Procedure in Cases of Criminal Contempts, by SEYMOUR D. THOMPSON. A continuation of the learned writer's article in the March number of this Magazine. The mode of instituting proceedings, and the proceedings on return of process are fully explained. Many American and a few English cases are cited.

Law Journal.—16th February, 1884.

The Solicitor's Lien in Company Liquidation and Administrations. A solicitor's lien prevents an order for delivery of documents, unless the documents were delivered to the solicitor under such circumstances that he knew others besides his client had an interest in them. A solicitor can claim no greater lien than the client who employs him, against that document which the client puts in his hands. The directors of a company have absolutely no power to create a lien on the register of members and the minute books, as these are to some extent public documents. The solicitor can have no lien on documents which come to his hands after the petition for liquidation is presented.

Ibid.—1st March, 1884.

The Law of Arbitration. The history of the law upon this subject is briefly sketched, and the cases of *Re Meier and Rouse*, L. J. Rep. C. P. 145, and *Fraser v. Ehrensperger*, L. R. 12 Q. B. D. 310, commented upon.

"It is now clear on the authority of the Court that without the magic words 'this submission to be made a rule of Court' in the agreement to refer, either party may retire from the agreement at any moment up to the making of the award. In other words, each party agrees to refer the dispute to arbitration, so long as he and his opponent remain of the same mind—an arrangement which is very far from being business like." The present state of the law is regretted, and legislative interference, with a view to its amendment and codification advocated. For a fuller discussion of the same subject, reference may be made to a contribution upon it at page 457 of this volume.

Ibid.—8th March, 1884.

Compensation for Misdescription. The article deals with the rights of a purchaser upon the purchase of real property misdescribed in the particulars in such a manner as to exaggerate its value. The decision in *Folliffe v. Baker*, 52 L. J. R. Q. B. 609, to the effect that where there was no fraud and no contract for compensation, the purchaser of land could not recover from the vendor compensation for a misdescription whereby the value of the property bought was made to appear greater than turned out to be the fact, is considered to be overruled by the later decision in *Palmer v. Johnston*, reported in the March number of the L. J. R. which is here criticised. A possible result of the later decision is suggested in the case of a transaction being opened up and compensation for a misdescription being demanded any time within six years after the delivery of the conveyance and payment of the purchase money. Parties to contracts of this nature are advised, in the present state of the law, to guard themselves against any such unfortunate contingency by express provisions.

Ibid.—29th March, 1884.

Railway Companies and Nuisances. Recent English cases are considered. Upon the question of the company's liability for damages, a distinction is drawn between acts productive of injury when done upon land acquired by the company through a voluntary sale to them, and when done upon land acquired by them under statutory powers. In the former case the company are liable; in the latter they are liable only where negligence can be shown. This distinction is firmly established, and extends to third parties. The reason offered is that, where the damage is caused from the working of the railway upon land compulsorily taken, the liabilities arising from proximity to a railway are supposed to have been compensated for in the amount allowed on the purchase. "No such compensation is, however, made to a proprietor whose land adjoins, but whose land is not taken. He falls a victim, on the one hand, to the theory that Parliament has authorized the working of a railway on particular land which adjoins his, and therefore he cannot bring an action; and, on the other, to the decision in *Brand v. The Hammersmith Railway Company*, 38 L. J. R. Q. B. 265, that his land is not injuriously affected 'by vibration, smoke and sparks.'" The latter case is adversely commented upon.

THE
CANADIAN LAW TIMES.

OCCASIONAL NOTES.

ONTARIO.

Supreme Court of Judicature.

COURT OF APPEAL.

Q. B. D.]

MIDLAND RAILWAY CO. v. ONTARIO ROLLING MILLS CO.

Contract to deliver goods—Refusal to pay as agreed—Right to refuse further delivery—Abandonment of contract—Counterclaim—Damages for non-delivery—Contract by correspondence.

The judgment of the Court below, 2 Ont. R. 1; 3 C. L. T. 55, was affirmed.

BELL v. RIDDELL.

Stifling prosecution for felony—Promissory note—Illegal consideration.

The judgment of the Court below, 2 Ont. R. 25; 3 C. L. T. 52, was affirmed.

Osler, Q.C. and Plumb, for the appellant.

Falconbridge, for the respondent.

C. P. D.]

PEART v. G. T. R. CO.

Railway Company—Negligence—Balance of testimony—Verdict of Jury—Setting aside.

A locomotive of the defendant company ran over and killed P. In an action by his representative, several witnesses for the plaintiff swore that no whistle was sounded nor bell rung on approach to the place where P. was killed. The engine driver and other employees on the train swore that the whistle was sounded and the bell rung. The jury found for the plaintiff, and the Court below refused to set aside the verdict. Their judgment was affirmed, Cameron, C.J., dissenting,

Bethune, Q. C., for the appellants.

Van Norman, Q.C., for the respondent.

ELLIS v. ABELL.

Sale of machine—Commendation of machine by manufacturer—Warranty—Verdict for more than claim.

The defendant, a manufacturer of steam threshing machines, recommended them in his advertisements as being safe from fire; alleged that the smoke stack would not throw out sparks; and that the separator which was sold and used with them did not throw out grain with the chaff; and that altogether, these were the best thresher and separator in the world. His agent in selling the machines extolled them in like manner. The plaintiff, after hearing these recommendations, ordered a machine from the defendant, which, on use, was said to be defective, the steamer throwing sparks and the separator wasting grain by throwing it out with the chaff.

Per Hagarty, C.J.O., and Rose, J. The commendations of the defendant amounted to a warranty, and the plaintiff was entitled to damages for the defects.

Per Burton, J.A., and Cameron, C.J. The defendant's language was mere commendation of the machines and did not amount to a warranty.

The jury rendered a verdict for the plaintiff for \$200 more than he claimed. The Divisional Court refused to interfere, and this Court affirmed their decision.

James MacLennan, Q.C., for the appellant.

Lount, Q.C., for the respondent.

PROUDFOOT, J.]

WALMSLEY v. GRIFFITH.

Agreement to purchase land—Deceit—Specific performance.

The plaintiff had consulted the defendants as to the disposal of a piece of land, and was asked to sell it for them, but on the evidence the Court was of opinion that he was not in this transaction the agent of the defen-

dants. He made a contract with a society of Oddfellows to sell them the land at \$25,000. He then led the defendants to believe that he could not dispose of the land for more than \$20,000, and he finally induced them to agree to sell to him at \$19,500.

Held, Burton, J.A., dissenting, reversing the judgment of the Court below, that he was not entitled to specific performance of his agreement with the defendants.

CAMERON v. BICKFORD.

Conflicting evidence—Credibility of witnesses not in question—Reversing finding of Judge at trial.

The learned Judge who tried the case, in which the testimony was conflicting and irreconcilable, rested his conclusion in favour of the defendant in a great measure upon the documents produced and the probabilities of the case. This Court, without differing from the learned Judge as to the credibility of the parties and their witnesses, having arrived at a different conclusion on the whole evidence, allowed the appeal and reversed the judgment of the Court below.

OSLER, J.A.]

COOK v. PATTERSON.

Conflicting evidence—Finding of Judge at trial—Reference of matters proper to be tried by Judge.

Where the evidence is contradictory the Court will not interfere with the findings of the Judge who tried the case.

The plaintiff sued for alleged breach of a contract to sell and deliver a quantity of hay to be inspected. The plaintiff gave evidence of shortage and defective quality, and asked for a reference as to damages; but the learned Judge who tried the case refused the reference, and gave judgment for the defendant.

Held, that the matters in question were proper for trial by a Judge, and that the plaintiff was not entitled to give *prima facie* evidence of a breach of contract and have a reference as to damages.

Bethune, Q.C., and *D. Smart*, for the appellant.

Hector Cameron, Q.C., and *H. F. Scott, Q.C.*, for the respondent.

C. C. KENT.]

WILLIAMS v. CROW.

Replevin bond—Damages—Solicitor and client costs.

The plaintiffs in this action were the defendants in a replevin action which was dismissed with costs. The plaintiffs taxed, and were paid, their costs of suit between party and party in the replevin action. They

then took an assignment of the replevin bond, which was in the statutory form, R. S. O. cap. 53, Form 2, and brought this action to recover the costs between solicitor and client which were in excess of their party and party costs.

Held, Burton, J.A., dissenting, reversing the judgment of the Court below, that the damages for the payment of which the statutory replevin bond is conditioned do not include solicitor and client costs.

Howard v. Lovegrove, L. R. 6 Ex. 43. not followed.

Moss, Q.C., for the appellants.

M. Wilson, and *E. Douglas Armour*, for the respondents.

C. C. N. & D.]

GARRETT v. ROBERTS,

Common informer—Infant—Incapacity to sue.

Held, reversing the judgment of the Court below, that the 18 Eliz. cap. 5, which enacts that an informer shall sue either in person or by attorney, is in force in this Province, and therefore the plaintiff, an infant suing by next friend could not maintain an action for a penalty under the Election Act.

Hector Cameron, Q. C., for the appellant.

Riddell, for the respondent.

C. C. WENTWORTH.]

MALCOLMSON v. HAMILTON PROVIDENT & LOAN SOCIETY.

Verdict of jury—Setting aside.

In an action concerning the ownership of certain chattels, where the jury found in favour of the plaintiff, and the learned Judge of the Court below refused to set it aside, this Court refused to disturb his decision, the question being one proper for the jury; though, had the verdict been in favour of the defendants this Court would have been better satisfied.

Crerar, for the appellants.

Wm. Bell, for the respondents.

ALEXANDER v. WAVELL.

Assignment in trust for creditors—Power to carry on debtor's business.

Held, Hagarty, C.J.O., dissenting, reversing the judgment of the Court below, that a clause in an assignment in trust for creditors which empowered the assignee to carry on the business for a time, did not invalidate the assignment.

Osler, Q.C. and Teetsel, for the appellant.

W. F. Walker, for the respondent.

C. C. YORK]

BURNS v. YOUNG.

Half-breed claim—Sale of void land scrip—Right to recover purchase money.

The plaintiff agreed to purchase from the defendant a half breed claim to land in Manitoba. The defendant assigned to the plaintiff the claim of one alleged to be a child of a half breed. This claim proved to be void and the scrip worthless.

Held, reversing the judgment of the Court below, that the plaintiff was entitled to recover from the defendant the amount paid him, re-assigning to him the scrip he had received.

A. Hoskin, Q.C., for the appellant,
James R. Roaf, for the respondent.

[14TH OCTOBER, 1884.]

ARMSTRONG v. BLACK.

Appeal from County Court—Interlocutory order—45 Vict. cap. 6, sec. 4.

Held, that an order of a County Court Judge refusing an application to set aside his own order for a *ca. re.*, and refusing to discharge the defendant, is not an appealable order under 45 Vict. cap. 9, sec. 4, it not being a decision or order in its nature final and not merely interlocutory.

The word "final" in the statute refers to the right or claim in question in the action, and not to the subject matter of the particular application.

H. J. Scott, Q. C., for the appeal.

F. E. Hodgins, contra.

(Reported by F. E. Hodgins, Esquire, Barrister-at-law.)

High Court of Justice.

COMMON PLEAS DIVISION.

[OSLER, J. A., 17TH OCTOBER, 1884.]

DOUGLAS v. HUTCHINSON.

Married woman—Dower—Separate estate.

A married woman, married to her present husband in 1871, was entitled to dower in land of which her former husband died seised, and was living thereon with her husband and children and working it; but her dower had never been actually set apart or assessed.

Held, that this was separate estate with reference to which she could contract debts; and that she could sell or dispose of it.

Shepley, for the plaintiff.

W. H. P. Clement, for the defendant.

CHANCERY DIVISION.

[BOYD, C., 22ND OCTOBER, 1884.]

DONALD v. DONALD.

Will, construction of—Joint estate—Past maintenance of infant children—Allowance for.

A testator gave "to my executor and executrix (his widow) all my real and personal property for the benefit of my children share and share alike, and of my wife while she continues my widow, and I give to my executor and executrix power to sell the whole of my real property for the support and maintenance of my said children and my wife while she remains my widow."

Held, that the widow did not take an estate for life *durante viduitate* with remainder to the children, but the widow *durante viduitate* and the children took a joint estate.

The widow, without the previous sanction of the Court spent money in maintaining the children, and now after some delay applied for an allowance therefor.

Held, that a reference might be taken at the widow's expense, to ascertain whether any portion of the infants' estate should be applied to recoup their mother's outlay for their maintenance.

MASTERS v. BIRNEY.

Motion for judgment—Length of notice—G. O. 418—Rule 407.

A motion for judgment was made by the plaintiff upon two clear days' notice of motion, the defendant having appeared but having filed no defence. It was objected by the defendant that seven days' notice of the motion should have been given under G. O. 418.

Held, that G. O. 418 is controlled by Rule 407, and that the two days' notice of motion was regular.

Cavell, for the plaintiff.

Masten, for the defendant.

[PROUDFOOT, J., 9TH OCTOBER, 1884.]

MORROW v. JENKINS.

Will, construction of—Bequest of interest of fund—Right to corpus.

The will of a testator contained the following clause :—"To my daughters, E. and M. M., I give, devise and bequeath the interest of three thousand dollars each per annum, to be paid to each of them half yearly."

Held, that the legatees took an absolute interest in the \$3,000 given to each of them.

Elton v. Sheppard, 1 Bro. C. C. 532, followed.

Garrow, for the plaintiff.

Moss, Q.C., for the defendants.

IN CHAMBERS.

[BOYD, C., 30TH SEPTEMBER, 1884.]

BEATTY v. HALDAN.

Appeal from Master—Ascertaining amount due by administrator pendente lite—Moderation of his solicitor's costs.

On an appeal from a certificate of the Master in Ordinary, in which he held that under an order which directed him "to ascertain and state what amount (if any) is properly chargeable by J. H. against the estate of T. W. deceased, in respect of legal proceedings taken by the said J. H. as administrator *pendente lite* of the said estate in the Courts or otherwise," the bills of costs of the solicitor of the administrator should be taxed in order to ascertain the amount due. It was

Held, that the Master was wrong; that the bills should, if necessary, be subjected to moderation and not taxation; that moderation is a well understood term, and is a more liberal proceeding than taxation even as between solicitor and client.

Hoyles, for the appeal.

O'Donohoe, Q. C., contra.

HOLDEN v. SMITH.

Settling minutes of judgment—Reference to judgment clerk—Judgment previously entered—Rule 416.

The minutes of judgment in this case were settled on 24th June, in presence of the solicitors for plaintiff and defendant. The defendant's solicitor objected to the settlement by the Local Registrar, and notified him that he desired the judgment to be settled by one of the judgment clerks, but asked for certain alterations to be made, which were made in pursuance of his request. The next day the judgment was entered as settled, and a copy served upon the defendant's solicitor, and execution was subsequently issued. On 30th June, on an *ex parte* application being made to the Chancellor, an order was made referring the judgment to a judgment clerk for settlement of the minutes. In September following an appointment was issued for settling the minutes, whereupon the plaintiff moved to set aside the *ex parte* order. A cross motion was made to set aside the judgment as entered.

Held, that the entry of judgment did not preclude the defendant from having the minutes settled by a judgment clerk under Rule 416, the policy of the Court being to encourage the settlement of all judgments by those officers who are acquainted with the phraseology thereof, in order to secure uniformity; and that the minutes should be referred to a judgment clerk for settlement. If any material alteration should be made the plaintiff to pay costs of the motion, otherwise the defendant to pay costs.

E. Douglas Armour, for the plaintiff.

Langton, for the defendant.

DAWSON v. MOFFATT.

Judgment—Costs—Set-off—Solicitor's lien.

An action for an account in the nature of a partnership account. By the terms of the judgment pronounced at the trial, costs up to the hearing were to be paid to the plaintiff out of a fund in Court; a reference was directed to take the accounts; and further directions and subsequent costs were reserved. By the report of the officer to whom the reference was directed the plaintiff was found indebted to the estate in a considerable amount. A motion was made by the defendant Moffatt (pending an appeal from the report) to stay payment out of Court of the costs awarded to the plaintiff, until after the hearing on further directions, in order that the amount found due to the estate by the plaintiff might be set off *pro tanto* against the costs awarded to the plaintiff.

Held, that the judgment pronounced at the trial gave the plaintiff and his solicitor a vested right to be paid out of the fund in Court, prior to the defendant's equity to ask a set-off, and no set-off should be allowed to the prejudice of the solicitor's lien thus arising. A solicitor's lien having been asserted at the Bar during the argument, an affidavit proving it was allowed to be put in subsequently, following the suggestion of Strong, V.C., in *Webb v. McArthur*, 4 Ch. Ch. R. 63.

Wallace Nesbitt, for the defendant Moffatt.

Ruttan, for the other defendants.

Arnoldi, for the plaintiff.

[29TH OCTOBER, 1884.]

ANGLO-AMERICAN v. ROWLIN.

Foreign plaintiff—Security for costs—No defence to action—Setting aside præcipe order for security.

The Local Master at Hamilton, on the application of the plaintiff, set aside a præcipe order for security for costs, the plaintiff swearing, and the defendant not denying that the defendant had no good defence to the action. A letter was produced, written by the defendant to the plaintiff, in which the former said, "My note for \$750 (the note sued on) in your favour is due on the 24th. You will kindly give me another month . . . when it will be paid in full."

Held, affirming the decision of the Local Master, that the defendant had no right to compel the plaintiff to give security for costs unless he had a defence on the merits, and that the failure to answer the affidavit of the plaintiff, and to explain the admissions in his letter warranted the conclusion that he had no defence.

Bank of Nova Scotia v. La Roche, 9 P. R. 503, not followed. *Winterfield v. Bradnum*, 3 Q. B. D. 325, and *Du St. Martia v. Davis*, 28 Sol. J. 392; *W. N.* 1884, p. 86, followed.

Watson, for the appeal.

William Bell, contra.

[PROUDFOOT, J., 9TH OCTOBER, 1884.]

LAIRD v. PATON.

*Specific Performance—Reference as to title—When good title first shown—
Registration of deed to vendor—Contract of sale—When interest
begins to run—Costs.*

On a reference as to title, under a judgment in a specific performance action which contained this clause, "And in case a good title can be made, an enquiry when it was first shown that such good title could be made," it was

Held, that these words meant, when was a good title first shown upon the abstract.

Held, also, that a vendor does not complete his title until his deed is registered, *i. e.* that registration is essential to the title.

A purchaser becomes liable to pay interest on the purchase money, when no time is fixed by the contract, from the time when he could prudently take possession; and in the case of the purchase of several properties under an indivisible contract he cannot prudently take possession until the title to the whole is made.

The ordinary rule in a vendor's suit is that the costs are given against him up to the time when he has first shown a good title; but where the question as to title is not the chief matter in dispute the costs will follow the result.

Where a purchaser's objections to the title have caused the litigation, and have been over-ruled, he will be liable for costs notwithstanding any decision in his favour on particular points in dispute.

J. R. Roaf, for the vendor.

McNab, for the purchaser.

[OSLER, J.A., 23RD SEPTEMBER, 1884.]

In re MERCHANTS BANK v. VAN ALLEN.

Prohibition—Division Court—Waiver—Delay.

In an action on a promissory note brought in a Division Court against the maker alone, M., the endorser, was made a defendant by the order of the Judge on the application of the original defendant, and was served by the latter with the order and a notice claiming relief against him on the ground that he had obtained the note by fraud. M. was not served with the summons, or a copy of the plaintiff's demand. He filed a notice disputing the defendant's claim against him, and excepting to the jurisdiction of the Court to try it, and also appeared at the trial and gave evidence, and objected to the jurisdiction. Judgment was given for the plaintiff against both the original defendant and M. Subsequently the original

defendant paid the judgment and took an assignment to a trustee and issued a judgment summons against M. M. moved before the Division Court Judge to set aside the latter proceedings, but his motion was refused. On a motion for a prohibition by M.,

Held, that judgment could not have been given against M. in his absence, because the summons and plaintiff's statement of claim had not been served upon him, but that by appearing in the suit and taking proceedings, both before and at the trial, M. had waived service of the summons and given the Court jurisdiction to give judgment against him.

Held, also, that having defended himself in the Division Court, and delayed moving for a prohibition, he had disentitled himself to relief.

E. Douglas Armour, for the motion.

D. M. Christie, contra.

[13TH OCTOBER, 1884.]

REGINA v. DILLON,

Criminal Law—Betting—Stake-holder—40 Vict., cap. 31.

By 40 Vict. cap. 31, sec. 1, in case any person becomes the custodian of any money, etc., staked, wagered or pledged, upon the result of any race, etc., such person is guilty of a misdemeanour. Sec. 2 provides that this Act shall not extend to any person by reason of his becoming the custodian of any money, etc., staked to be paid to the winner of any lawful race, sport, game or exercise, or to the owner of any horse engaged in any lawful race, or to bets between individuals. The defendant held money stakes to be paid to the winners of a double scull boat race, which was a lawful race.

Held, that a conviction therefor was bad, the case being within the above proviso,

Fenton, for the Crown.

T. C. L. Armstrong, for the defendant.

[20TH OCTOBER, 1884.]

GRAY v. ALEXANDER.

Final interpleader order—Sheriff's costs.

In an interpleader matter, on appeal by a Sheriff from the order of the Master in Chambers striking out so much of a former order as awarded the Sheriff his costs of appearing on a motion made by the claimant for a

final order barring the execution creditor for default in giving security for costs,

Held, that the Sheriff was properly served with notice of such motion and was entitled to his costs thereof.

W. H. P. Clement, for the Sheriff.

George Kerr, Jr., for the claimant.

Shepley, for the execution creditor.

[21ST OCTOBER, 1884.]

REGAN. v. WATERS.

Taxation of costs.—Appeal from Surrogate Court—Scale of costs.

Held, on appeal from the Taxing Officer, that the costs of an appeal from a Surrogate Court to the Court of Appeal should be taxed on the scale of the Court appealed from as provided by Rule 28 of the Court of Appeal, and not on the scale of County Court Appeals.

Holman, for the appeal.

Davidson, contra.

[28TH OCTOBER, 1884.]

DARLING v. SMITH.

Absconding Debtors Act—Costs—Distribution of estate.

On the 25th January, 1884, seven warrants of attachment, at the instance of different plaintiffs, were issued out of a Division Court against the goods of the defendant, an absconding debtor, and under these warrants the Bailiff seized certain goods. Subsequently, and on the same day, a writ of attachment was issued by the plaintiff in this action against the defendant as an absconding debtor, and the goods seized by the Bailiff were delivered up by him to the Sheriff, pursuant to section 16 of the Absconding Debtors Act. Five other Division Court attachments, and one County Court attachment, were afterwards issued. Judgments were recovered by all the attaching creditors. Executions were issued in the actions in the Superior and County Courts and the Clerk of the Division Court certified to the Sheriff with memorandum of the judgments pursuant to section 16 of the Absconding Debtor Act.

Pending this action, an order was made for the sale of the goods attached under the writ, and the goods were sold and the proceeds of the sale paid into Court.

Upon a motion for distribution of the moneys in Court, it was ordered that the money in Court should be applied, (i) in payment of the costs of issuing the plaintiff's writ, and the fees and charges paid to the Sheriff for executing it, and any fees which had been incurred in the Division Court in issuing the warrants of attachment on the 25th January and seizing the property and holding it till it was delivered to the Sheriff, and also the costs of the order directing the Sheriff to sell and the costs of this application; and (ii) in rateable distribution amongst the execution creditors and Division Court creditors who had produced to the Sheriff certified memoranda of their judgments.

Aylesworth, for the plaintiffs.

Holman, contra.

[28TH OCTOBER, 1884.]

In re GREY v. GRAND TRUNK RAILWAY Co.

Prohibition—Division Court—Foreign Corporation—Waiver.

The defendants, a foreign corporation having their head office in Montreal and not residing or carrying on business in this Province (as held in *Re Ahrens v. McGilligat*, 23 C. P. 171, and *Re Westover v. Turner*, 26 C. P. 510) were sued by the plaintiff in a Division Court of the United Counties of Northumberland and Durham, within the jurisdiction of which the cause of action arose. The summons was served upon the Station Master of the defendants at Bowmanville, within the same division. No notice disputing the jurisdiction was given by the defendants until the trial of the action, when Counsel appeared in their behalf and objected to the jurisdiction of the Division Court, because the defendants resided out of the Province. The Judge of the Division Court overruled the objection, and proceeded to try the case. The defendants' Counsel cross-examined the plaintiff's witnesses, and addressed the jury. Judgment was given for the plaintiff.

On motion for a prohibition,

Held, that the service on the defendants was a nullity.

Held, also, that these defendants could not be compelled to appear to a summons issued against them in an ordinary Division Court action, because no means have been provided for effecting service upon them, but,

Held, that the defendants had precluded themselves by their appearance and conduct at the trial from objecting to the jurisdiction, and the Court having jurisdiction over the cause of action as to its locality, nature and amount, prohibition ought to be refused.

Aylesworth, for the defendants.

Holman, for the plaintiff.

[ROSE, J., 2ND JULY, 1884.]

OGDEN v. CRAIG.

Interpleader—Intended seizure.

Upon an interpleader application by the Sheriff of Bruce, it was sworn that the Sheriff intended to seize certain chattels in the possession of the execution debtor, but was unable to do so because they had, before the writ of execution was placed in his hands, passed into the possession of the claimant, a chattel mortgagee of the judgment debtor, and that the claimant refused to produce them and claimed them in his own right.

Held, affirming the decision of the Master in Chambers, that the Sheriff was not entitled to interplead.

Allan Cassels, for the Sheriff.

H. F. Scott, Q. C., for the execution creditor.

W. H. P. Clement, for the claimant.

[THE MASTER IN CHAMBERS, 2ND OCTOBER, 1884.]

TILSONBURG MANUFACTURING Co. v. GOODRICH.

Examination of parties before trial.

In an action in the Queen's Bench Division the defendant issued an appointment and subpoena for the examination of an officer of the plaintiff's company before issue joined, but after the delivery of the statement of defence. No affidavit was filed with the officer who issued the appointment.

Held, that the Chancery practice of examining the parties before issue joined is now in force in all Divisions, but

Held, also, that in an action in a Common Law Division an appointment to examine should not be issued by an officer of the Court unless an affidavit is filed with him as directed by sec. 159 of the C. L. P. Act.

Aylesworth, for the plaintiffs.

Meek, for the defendant.

[11TH OCTOBER, 1884]

WRIGHT v. LEYS.

Notice of appeal—Time for service.

A notice served on Monday, the 6th October, of an appeal to the Court of Appeal from a judgment given on the 4th September, was set aside as irregular.

F. Ruttan, for the motion.

Walter Read, contra.

WILSON v. RODGER, MACLAY & CO.

Partnership—Action against partners—Dissolution—Suing in partnership name.

In an action against persons for a cause of action which arose while they were partners, the plaintiff may sue them in their late partnership name, though the partnership was dissolved before the writ was issued.

In this case the defendants were sued in the firm name of their partnership, which existed at the time of the accruing of the cause of action, but was dissolved before the commencement of this suit.

Geo. Bell, on behalf of one of the defendants who had been served with the summons, now moved to set aside the service, because the partnership had been dissolved before the issuing of the writ.

Urquhart showed cause.

The MASTER IN CHAMBERS, 15th October, 1884.—High authorities in the law have dealt with this question. The Lord Chancellor, Lord Justice Cotton, Lord Justice Brett, and Mr. Justice Hawkins have all delivered opinions upon this point, Lord Justice Cotton holding that the action cannot be sustained in this form where the partnership had been dissolved before action, Lord Justice Brett and Mr. Justice Hawkins being of the contrary opinion, the Lord Chancellor thinking the matter doubtful.

All existing authority on the subject that I am aware of will be found in L. R. 19 Ch. D. 124, and L. R. 2 Q. B. D. 436 and 475; all views of the question and all the arguments that bear upon these opposite constructions of the rule will be found in the above case.

Under the circumstances, I do not presume to discuss the matter at length. I simply refer to the cases. But I have to decide what I think the law to be, and it is proper I should give my reason for it.

The words of the Rule are, "Any two or more persons being liable as co-partners, may be sued in their firm name, if any, etc."

The effect of these words is much larger than if the words had been that two or more partners might be sued. The latter form of expression would indeed raise the question whether the defendants must not be partners at the time of action brought. But if the defendants be once liable as co-partners, the dissolution of the partnership does not take away nor alter that liability. Therefore, after the dissolution of their partnership the defendants are still within the words of the Rule, "liable as co-partners."

It does not seem, upon the best consideration I can give it, that the broad and natural meaning of the words of the Rule is at all affected by the fact that the Rules go on to specify modes of service of the summons, some of which are inapplicable to a case where the defendants are not partners at the commencement of the suit. I think that circumstance leaves the construction of the Rule still open to the operation and meaning of its words, because these methods of service I refer to may be well taken to be intended by the Rules for cases where the partnership is still in existence at the time of suit, so that this construction gives full effect to all the enactments of the Rules.

And as I believe this is the true construction of the language, I also think it the construction which is most beneficial in practice.

I dismiss this motion; costs under the circumstances to be in the cause.

OSLER, J.A., 21st October, 1884, dismissed an appeal from the order of the Master in Chambers.

MASTER'S OFFICE.

[THE MASTER IN ORDINARY.]

HUGHES v. REES.

Estoppel—Pleading—Jurisdiction of Master—Indemnity to trustee under a void trust deed—Husband and wife—Agency—Maintenance of children.

Where a party does not plead a prior judgment in bar by way of estoppel, before the entry of a judgment directing a reference to the Master, he waives it, and leaves the whole matter at large to be enquired into on the evidence.

The Master has no jurisdiction to make amendments to the pleadings after judgment, nor could he give leave to file a statement in his office raising a defence which ought to have appeared in the pleadings.

It is incident to the office of a trustee that the trust property shall reimburse him for his expenses in administering the trust, and a clause so indemnifying a trustee is infused into every trust deed; and the statute R. S. O. cap. 107, sec. 3, does little more than Courts of Equity had been accustomed to do without any statutory direction.

Therefore a trustee who had been induced by a settlor to accept a trust, under an instrument void by the law of the settlor's domicile, is entitled to be reimbursed by such settlor for all his expenses incurred in the execution of the trust.

The defendant's wife, who had been supported by the plaintiff with the defendant's consent, returned to her husband's home, but was turned out of the house by him, whereupon the plaintiff again took charge of and supported her.

Held, that the defendant by turning his wife out of his house sent her forth as his agent to pledge his credit for the necessities of life suitable to her position, and that the plaintiff was therefore entitled to assert a claim against the defendant for his expenses in so supporting her; and such claim could be maintained up to the date of a judgment allowing alimony to the defendant's wife.

Where a father, whose children are maintained by another, and who could have obtained possession of their persons by *habeas corpus*, allows them to be so maintained, he is liable for their support and maintenance to the person in whose care such children are.

KEEFER v. McKAY.

Cloud on title—Specific performance.

The registration of any instruments which cast doubt or suspicion on the title, or which embarrass the owner in maintaining his estate or in disposing of his property, is a cloud upon the title against which the Courts will relieve. And in such case it is sufficient if there is a registered instrument, apparently valid on its face, accompanied by a claim of title, although an intruder on the chain of title which is likely to work mischief to the real owner.

A purchaser at a sale of lands held under an order of Court, objected to the title on the ground that four deeds had been registered against half of the lot by parties who apparently intruded the deeds on the registered title, one of which parties notified the purchaser that he claimed some interest in the lands.

Held, that such registered deeds were clouds upon the title, and that the purchaser could not be compelled to take the title.

NEW BRUNSWICK.

In the Supreme Court.

[OCTOBER, 1883.]

ROBINSON v. FERGUSON.

Trover—Promissory note—Executor—Action by—Measure of damages where executor maker of note.

A., who was the maker of a note in favour of F., was appointed by the latter executor of his will. The defendant took possession of the note at F.'s death, and refused to give it up to A. on request. In an action of trover brought by A. as executor for the conversion of the note, a verdict was recovered for the amount of the note, leave being reserved to defendant to move to reduce it to nominal damages.

Held, per Weldon, Wetmore, King and Fraser, JJ., that the amount of the note was not the proper measure of damages, and that the verdict should be reduced to nominal damages.

Per Allen, C. J., that the verdict should stand subject to be reduced to nominal damages in case the defendant delivered up the note.

[NOVEMBER, 1883.]

ROBINSON v. NEW BRUNSWICK RAILWAY.

Railway Company—Fire set by sparks from defendants' locomotive—Negligence in choice of fuel—Destruction of uninsured property—Contributory negligence—Evidence.

Railway Companies are bound to use care, as well in the kind of fuel which they burn as in the construction and appliances of their engines; and it is proper to direct the jury to find whether, under the circumstances, it is, or is not, negligence to use wood as fuel for their engines, the evidence showing that there is more danger from the use of wood than from coal.

Where the plaintiff's property has been burned through the defendants' negligence, it is no answer to the defendants' liability for damages that the property was insured.

Where the plaintiff's barn was burnt by the negligence of the defendants, although the plaintiff was guilty of negligence in constructing his barn in such a way that hay in it would be exposed to sparks blown against, or falling upon the barn, that will not disentitle him to recover if the defendants might, by the exercise of ordinary care and caution on their part, have avoided the consequences of the plaintiff's carelessness or neglect.

Evidence that fires frequently occurred along the defendants' line of railway after the passing of their trains is admissible in an action against the defendants for injury resulting from sparks from locomotives.

Evidence offered by the defendants to show what kind of fuel was used on other railways in the Province is irrelevant.

CARMAN v. DUNN.

Damages—Costs of review from justice's Court—Discretion of Judge—Res judicata.

On review from a judgment of nonsuit in a Justice's Court, the County Court Judge set aside the nonsuit, without costs. Previous to the order for review being obtained, an execution had been issued by the Justice, on which the plaintiff had been arrested, but on the order for review being granted, he was released. In an action for false imprisonment,

Held, by Allen, C. J., and Weldon, Palmer, King and Fraser, JJ. (Wetmore, J., dissenting) that as the County Court Judge had "wholly reviewed" the judgment of the magistrate, the awarding of costs to him should have followed and was not a matter in the discretion of the Judge, and that the plaintiff was entitled in this action to recover the expenses to which he had been put in securing such reversal of judgment.

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No. 14.

CAN A BIDDER AT AUCTION RETRACT HIS BIDDING ?

THE provisions of the Statute of Frauds so greatly affect the answer to this question, and the enactments with respect to the memorandum in writing necessary to be made on a sale of lands, or of goods over ten pounds in value, are so much alike, that no distinction need be made between sales of goods and sales of land in discussing the subject.

Sales by auction being had, either at the instance of the vendor or by order of a Court of Justice, we shall examine the point, first, as arising at a sale had by a vendor, and, secondly, as to how the question is affected by the sale being under an order of Court.

An auction has been said to be *locus penitentiae*. In *Payne v. Cave* (a), it was held, in the absence of any condition to the contrary, that a bidder might retract his bidding at any time before the hammer fell. The Court said, "The auctioneer is the agent of the vendor, and the assent of both parties is necessary to make the contract binding; that is signified on the part of the seller by knocking down the hammer, which was not done here till the defendant had retracted. An auction is not inaptly called *locus penitentiae*. Every bidding is nothing more

(a) 3 T. R. 148.

than an offer on one side, which is not binding on either side till it is assented to. But according to what is now contended for, one party would be bound by the offer, and the other not, which can never be allowed."

"A condition that no person shall retract his bidding was suggested to me," says Lord St. Leonards, "by the case of *Payne v. Cave*, and it has now become a common condition. But I always thought it one that could not be enforced" (b). And that learned writer refers to the difficulty suggested by Baron Wood, in *Jones v. Nanney* (*infra*), that the Statute of Frauds presents an obstacle which cannot be overcome by a condition of the sale or by agreement of the parties.

The condition of sale, now in common use restrictive of the right to retract biddings, is one of the standing conditions of sale of the High Court of Justice, and reads as follows:—"No person shall advance less than \$ at any bidding under \$, nor less than \$ at any bidding over \$, and no person shall retract his bidding."

Without this condition, as we have seen, there seems to be no question as to the right of the bidder to retract his bidding. But the authorities bearing directly upon the effect of the condition are very meagre.

There are four possible events out of which the question of holding the bidder to his offer might arise, viz., where the bidder retracts his bidding (i) After his name is taken down but before the hammer falls; (ii) After his name is taken down and after the hammer falls; (iii) Before his name is taken down and before the hammer falls; (iv) After the hammer has fallen but before his name is taken down.

(i) *After name taken down but before hammer falls.*—The condition, in a qualified form, appears in the case of *Jones v. Nanney* (c). This case was very fully argued, and is instructive upon the subject. The question arose between the auctioneer who had paid duty upon the sale

(b) Sug. V. & P. 14.

(c) 13 Pr. 76.

and sought to recover the amount from the highest bidder. The sale was held upon conditions, one of which was that no person should retract his or her bidding after it had been taken down and declared by the auctioneer. Another condition was, "That the purchaser of each lot should pay to the auctioneer the duty granted to Her Majesty on the sale of real estates."

The facts were these :—Two lots were put up for sale, and after several biddings the defendant bid £4,000, and this bidding was then taken down by the plaintiff, the auctioneer. The lots were not then knocked down, but the plaintiff put them off for a while, as he said, "to give gentlemen time to consider." In less than an hour the plaintiff declared, in the hearing of the defendant, that he was going back to the two lots, and to the defendant's bidding of £4,000, that he would give two minutes to consider, and unless there was an advance, he would knock it down to the defendant at £4,000. The defendant then said, but not loud enough for the plaintiff to hear, that he would not have the two lots. There being no advance, the plaintiff knocked them down to the defendant, who refused to complete his purchase or sign any agreement therefor. The plaintiff having paid the duty to the Crown brought this action to recover it from the defendant.

In order to recover, the plaintiff was bound to show that the defendant was a purchaser within the fourth condition. Hullock, B., said (*arguendo*), "knocking down the hammer does not constitute a complete sale; it does not make a valid contract between the parties, within the Statute of Frauds. If we should go with you as far as you require, in holding this to be such a sale as would have incurred the auction duty, which must in that case have been paid by some person; still, to make the defendant liable to this plaintiff in this action, you must show him to have been a purchaser, which you cannot do unless there was a sale for all purposes." The Chief Baron then asked if the point of the defendant being a purchaser was surrendered, and the answer was, that that point was given up. Notwithstanding this, counsel for the defendant argued that

part of the case for his client. There was a count in the declaration for retracting the bidding; and for the defendant it was contended, that to hold that an action would lie on an implied undertaking not to retract, would furnish a mode of getting rid of the Statute of Frauds, which could not be permitted. There is a note to this argument that Baron Wood propounded this difficulty—"whether, if there had been an express condition of sale, that the Statute of Frauds should have no operation on the transaction between the parties, it could be contended to be an efficient condition, so as to avoid the statute."

The Court held finally that the defendant was not a purchaser, and so not liable to pay the duty to the auctioneer. Alexander, C.B., said, "It becomes necessary in this case, that we should ascertain what is the true construction to be put on the word purchaser. The plaintiffs' counsel have found themselves under the necessity of insisting, that a purchaser meant a person who was only a bidder, and that the defendant was such a purchaser, although merely a bidder. The question is not, whether he may have behaved ill or not, but whether he was a purchaser of the lots put up, and was bound to abide by his bidding, and therefore liable to pay the duty. If he was not bound by his bidding, he was not liable to pay the auction duty. It is admitted that he was not." And Baron Hullock said, "In point of fact, however, there was no contract of sale. Then why might not the defendant have retracted his bidding on the postponement of the auction?" The result is clear, then, that a bidder as such, is not a purchaser—his bidding does not bind him, even when his name has been taken down at the time of his bid; to permit him to be considered a purchaser would be to evade the Statute of Frauds.

Attention must now be more particularly directed to the wording of the condition in *Jones v. Nanney*. It was not an absolute condition that no person should retract his bidding, but that he should not retract his bidding after it had been taken down and declared by the auctioneer. The report is clear on both points, that the defendant's

name as a bidder had been taken down, and that his bid had been declared. All things had therefore happened to bring the defendant within the condition; and yet the Court held that the highest bidder, under the circumstances, was not a purchaser. It is evident from the frame of the condition that the vendor did not consider the taking down of the bidder's name a signing within the meaning of the Statute of Frauds; for then a condition against retracting would have been useless. And we may also deduce from the case that such a taking down of the bidder's name, *per se*, is not a signing so as to have a prospective binding effect upon the bidder, who, *volens*, because purchaser on the fall of the hammer. In a case so fully argued, in which the effect of the Statute of Frauds was directly pointed out by at least one Judge, it is fair to assume that that point did not escape the attention of either the Court or counsel engaged.

The nature and extent of the auctioneer's authority to act for the bidder was not expressly passed upon in *Jones v. Nanney*. A glance at some of the authorities may therefore be useful.

The auctioneer is not *ex vi termini* agent for both parties. That depends upon the facts of the case (*d*). But in the absence of agreement to the contrary he is presumed to be such an agent. In *Campbell on Sale* (*e*), it is said, "A bid at an auction is a mere offer; the auctioneer is, until a bargain is struck, the agent of the vendor alone; and the vendor's acceptance of the offer is signified by knocking down the hammer." And again, at another place (*f*), the learned writer seems to think that it is the fall of the hammer which completes the bargain, and if a memorandum has been made previously to the fall, that memorandum then becomes a memorandum of the contract which satisfies the Statute of Frauds (*g*). And again, at another

(*d*) *Bartlett v. Purnell*, 4 A. & E. 792.

(*e*) P. 141; citing *Payne v. Cave*, 3 T. R. 148, and *Warlow v. Harrison*, 28 L. J. Q. B. 18.

(*f*) P. 223.

(*g*) If so, then it must be by assuming that the hammer falls with the assent of the bidder, and that the previous signature, having no original virtue, is adopted and confirmed by the bidder, and becomes a valid

place (h), he says, "According to established usage he is, until the fall of the hammer, the agent of the seller alone. On the fall of the hammer he becomes the agent for both parties to strike the bargain, and is further authorized, as the agent of both parties, to do what is necessary to bind the bargain according to the Statute of Frauds." In *Benjamin on Sale* it is said, "The agency of the auctioneer for the purchaser only begins where the contract is completed by knocking down the hammer. Up to that moment he is the agent of the vendor exclusively. It is only when the bidder has become the purchaser that the agency arises; and until then the bidder may retract, and the auctioneer may do the same on behalf of the vendor (i). In *Warlow v. Harrison*, cited by Mr. Benjamin, Lord Campbell, C.J., delivering the unanimous judgment of the Queen's Bench, said, that the auctioneer becomes agent for the purchaser "only when there is a contract of sale by the acceptance of the bidding, which is usually declared when the hammer is knocked down. Then the purchaser, or his representative, being present, authorizes the auctioneer to sign the memorandum. But, till the hammer goes down, the auctioneer is exclusively the agent of the vendor." The case went to the Exchequer Chamber, but was not reversed. This case and *Bird v. Boulter* (j), are the most clear and direct authorities upon the point of the commencement of the auctioneer's authority to act for the purchaser. In the latter case, Taunton, J., said, "Pitt may be considered not only as the agent of the vendors, but also of the purchasers. By their silence when the hammer falls, he has their authority to execute the contract on their behalf." And *Story* (k), citing numerous authorities, says, "Before the

signature from the moment of the fall of the hammer with the bidder's assent, the authority to sign dating from that moment. It must also be assumed that it is a signing sufficiently connected with the particulars and conditions of sale to make a memorandum which will bear the test of the statute. See *Hinde v. Whitehouse*, 7 East, 558, 569; *Kenworthy v. Schofield*, 2 B. & C. 945.

(h) P. 422.

(i) Sec. 270; citing *Warlow v. Harrison*, 1 E. & E. 295; 28 L. J. Q. B. 13.

(j) 4 B. & Ad. 443.

(k) *Story's Agency*, 29.

knocking down of the goods he is indeed exclusively the agent of the seller; but after the knocking down, he becomes also the agent of the purchaser, and the latter is presumed to give him authority to write down his name as purchaser."

Though there are to be found authorities (*l*) which say that it is the bid itself which authorizes the auctioneer to write down the bidder's name; from which it might be inferred that the agency of the auctioneer would date from the pronouncing of the bid; yet, if we regard the authorities which we have cited above, that direction to the auctioneer must be an authority to be exercised upon certain conditions only. We shall probably be safe in following the authorities which we have cited, and in concluding that the authority of the auctioneer to sign for the bidder arises only upon the fall of the hammer on the bid with the bidder's consent, or rather without his having audibly dissented.

Putting the matter upon this ground, however, that the writing down of the name constitutes a written offer by the bidder, the law seems to be that such an offer may be withdrawn at any time before acceptance (*m*), and the fall of the hammer is the signification of acceptance by the seller.

This conclusion arrived at, we dispose of the question as arising on the first event.

The third event, where the bidder withdraws before his name is taken down and before the hammer falls, is not complicated by the fact of a potential signature for him, viz., the taking down of his name by the auctioneer at the time of his bid. It therefore presents a case of a bidder being verbally bound to a contract, which the Statute of Frauds requires to be in writing and signed by him, if the condition that he shall not retract his bidding is one that can be insisted on.

(ii) *After name taken down, and after hammer falls.*—The bid is, as we have seen, a mere verbal offer. The auc-

(*l*) *Emmerson v. Heelis*, 2 Taunt. 38; *White v. Proctor*, 4 Taunt. 209.

(*m*) *Martin v. Mitchell*, 2 Jac. & W. at p. 428.

tioneer taking down the name of the bidder may possibly be equivalent to the bidder himself writing down his name. Assume it to be so, and thus take the highest ground against the bidder. The position then resolves itself into this, that the bidder has made an offer in writing of a specific price for the property offered for sale, upon the terms specified in the particulars and conditions of sale. (We assume, of course, that the writing down of the name is done so as to connect it with the particulars and conditions, and constitute with them a memorandum sufficient to satisfy the Statute of Frauds.) This is a continuing offer from the moment it is made to the time of its acceptance, and the bidder is considered in law as making, during every instant of that time, the same identical offer to the seller (n). If, then, the hammer falls upon such an offer, the vendor is considered as having thus signified his assent to it, and it is clear that a parol acceptance of a written offer is good (o).

We have seen, however, that the most eminent text-writers agree upon this, that the authority of the auctioneer to sign for the purchaser dates only from the fall of the hammer with the bidder's assent. The writing down of the bidder's name by the auctioneer before the hammer falls, must therefore be without authority. It is, in the absence of something to show the contrary, a mere minute made by the agent of the vendor of the name of a person who may become a purchaser (p). Referring again to *Campbell on Sale* (q), that learned writer says, "It is well settled that a person who bids at an auction offers to buy at the price bid, and upon the terms of the conditions of sale; and, by implication, he gives authority to the auctioneer to set down his name upon a memorandum containing the terms of that offer. If the offer becomes a contract, which it does, according to the general usage in

(n) *Adams v. Lindsell*, 1 B. & Ald. 681, 683.

(o) *Reuss v. Picksley*, L. R. 1 Ex. 342; affirming *Warner v. Willington*.
3 Drew. 523; *Smith v. Neale*, 2 C. B. N. S. 67.

(p) *Hinde v. Whitehouse*, 7 East, at p. 569.

(q) P. 223.

auctions, by the fall of the hammer, such a memorandum is a memorandum of the contract, duly signed according to the statute." And he cites for this, *Simon v. Motivos* (r); *Hinde v. Whitehouse* (s); *Emmerson v. Heelis* (t); *White v. Proctor* (u); *Kenworthy v. Schofield* (v). In none of these cases however does it appear that the memorandum of the bidder's name was made before the hammer fell. On the contrary, the reports show that the names of the purchasers were put down after they had been declared to be the highest bidders.

The memorandum of the bidder's name made before the hammer falls may, however, be adopted by the highest bidder, after the hammer falls upon his bid, if it falls with his assent. And it may possibly be that, if the bidder, knowing that his name had been so taken down, permitted the hammer to fall upon his bid, and then allowed some little time to elapse, he might afterwards, on attempting to withdraw, be told that he had adopted the signature made for him. On the other hand, however, it is a principle of the law of agency that an act to be ratified must be professedly done on behalf of the person who subsequently ratifies it (w). The act of the auctioneer in putting down the bidder's name before the hammer falls is unauthorized, and therefore void, and incapable of ratification. In the absence of anything to show the contrary, it is done as agent for the vendor, and on his behalf, and cannot be ratified by the bidder. Apparently, then, there must be something to show that after the hammer fell the bidder expressly adopted the memorandum made by the auctioneer as his signature.

(iv) *After hammer falls, but before name taken down.*—Assume now the case of a bidder whose name has not been taken down, but on whose bid the hammer falls with his

(r) 1 W. Bl. 559.

(s) Supra.

(t) Supra.

(u) 4 Taunt. 209.

(v) 2 B. & C. 945.

(w) *Watson v. Swann*, 11 C. B. N. S. 756.

assent. Can he then withdraw, and so prevent the auctioneer from signing so as to bind him? In other words, is the authority to the auctioneer given to him by the bid, an irrevocable authority?

In *Jones v. Nanney* we found that the auctioneer, as a fact, did not sign after the fall of the hammer, and the bidder refused to sign. But the auctioneer had previously written down the bidder's name. Whether or not the name was so written as to constitute a signature, sufficiently coupled with the particulars and conditions as to make such a signed memorandum as the Statute of Frauds requires, does not appear. If not, then assuming the signature to be good, the memorandum as a whole was bad, because not signed. But if the name was sufficiently connected with the memorandum then we have a stronger case than the one we now put.

Recurring again for a moment to *Payne v. Cave* (supra), we see that every bid is merely an offer on the part of the bidder which is not binding until acceptance. The parties are therefore in the position of two persons, one of whom offers verbally to sell certain property, and the other makes an offer verbally of a specific sum for it. Now, a parol agreement is good, but the evidence of it must be in writing. When, therefore, a vendor publicly offers his property for sale, and a proposing purchaser publicly offers to buy at a certain price, and the vendor (by his agent, the auctioneer, bringing down the hammer) signifies his assent to the price offered—when all these things happen, there is a complete agreement. But it requires writing in order to bind the parties. If the purchaser refuses personally to sign the agreement there is no power to compel him to sign. Otherwise, in any case where a parol agreement existed, which could not be enforced for want of a writing, the party seeking enforcement could first bring an action to compel signature of the alleged agreement—an absurd conclusion. If the purchaser may refuse to sign, is it not quite as much in his power to withdraw his agent's power to sign? The agent, lawfully authorized under the statute, must evidently be an agent authorized for the purpose of

signing, and at the time of signing retaining his authority. The fall of the hammer is, first, the signification of the vendor's assent to the price bid, and, secondly, the fall during the silence of the bidder which follows his bid, or rather the silence of the bidder while the hammer falls, is the authority to the auctioneer to sign. We have seen, however, that the agency of the auctioneer for the purchaser may be disproved. It is only a presumption. If, then, the fall of the hammer is followed, immediately or within a reasonable time, by a direction from the bidder not to sign for him, or a refusal by him to sign, it seems reasonably clear that the auctioneer could not bind him by signing for him, for the presumption of agency in the auctioneer is rebutted by the facts.

The effect of a condition against retracting bids.—So far, we have considered this point only in connection with *Jones v. Nanney*. The difficulty there suggested is the main one, viz., that it is a condition that the Statute of Frauds shall not be applicable to the bargain. And Baron Wood there suggested the case of a preliminary agreement that the statute should not govern, which is clearly an agreement that cannot be given effect to.

If we could establish agency between the bidder and the auctioneer immediately upon a bid being made, the condition would amount to a condition that the authority to the auctioneer to sign for the purchaser should be irrevocable—which would be equivalent to holding the bidder to a verbal contract, and so obnoxious to the Statute of Frauds. For the authority would originate with the bidder, but would be continued and kept in force by the vendor, and at his will alone. Now if the auctioneer be himself the vendor he cannot sign for the bidder (x). And if the vendor himself cannot keep the bidder to his bargain by signing, how can he keep him to his bargain by appointing an agent to sign? How can he delegate power which he does not possess?

The condition is unilateral. Can the person imposing the condition compel any bidder to comply with it before

(x) *Farebrother v. Simmons*, 5 B. & Ald. 333.

signing it? If so, then, apparently, he can compel observance of another condition that usually accompanies it, viz.: "The purchaser at the time of sale shall sign an agreement for the completion of the purchase." If he refuse to do so, is there any redress? Apparently not in respect of the purchase, though there might be an action for the wrong. The vendor is not in as strong a position as that in which Baron Wood puts him by his suggested case of an agreement that the Statute of Frauds should not apply. For here there is no agreement until the condition is signed; unless the bid given in accordance with the condition is considered an agreement. But a parol agreement that the statute should not apply seems like a double outrage on that sacred enactment.

Putting the parties again in the position of persons privately proposing a sale and purchase, we find that an offer may be withdrawn or varied (*y*) at any time before acceptance, even though a time has been named for its acceptance (*z*). And if a vendor cannot, without accepting his offer, hold a proposing buyer to a condition imposed by the buyer (*i. e.*, to leave his offer open for a specified time), how can he hold him to a condition imposed by himself? The point as to the right of a vendor to withdraw after the fall of the hammer was raised in *Blagden v. Bradbear* (*a*), but not decided, as the receipt given by the auctioneer after his authority had been withdrawn by the vendor did not show the price or terms, and was thus plainly defective. The condition in effect says to proposing buyers, If you make any offer, I shall reserve to myself the right to hold you to that offer, without accepting it, for a reasonable time (*b*), in order that I may make up my mind whether I shall accept it or not. The authorities which we have already cited show that this position cannot be assumed.

(*y*) *Honeyman v. Marryatt*, 1 Jur. N. S. 857; 21 Beav. 14; 6 H. L. C. 112.

(*z*) *Routledge v. Grant*, 4 Bing. 653; *Martin v. Mitchell*, 2 Jac. & W. at p. 428; *Lucas v. James*, 7 Ha. 410.

(*a*) 12 Ves. 466.

(*b*) *Kennedy v. Lee*, 3 Mer. at p. 54.

Judicial Sales.—Is there any difference between a sale carried on at the instance of a vendor and one conducted under a judgment or order of a Court? A passage in Mr. Dart's work on Vendors and Purchasers (c) seems to indicate that sales by a Court are not within the Statute of Frauds. This is somewhat misleading when applied to our practice in carrying out such sales. The authorities cited at this passage show that the learned writer refers to the practice of selling before a Master of the Court, who certifies the purchaser. This indication of the purchaser is equivalent to a judgment of the Court upon the sale, and consequently cannot be within the statute. The principal case cited is *Att'y-Gen. v. Day* (d). That was a bill for an account and settlement of an estate; and a decree was made accordingly, with a direction to the Master to receive a scheme for carrying it into execution; the foundation of part of which was to consider in what way money should be laid out to create a perpetual fund for maintenance of a charity. The Master reported a scheme for laying out money in the purchase of land, and a decretal order was made confirming the Master's report. This information was brought on behalf of the charity to have the purchase carried out. Lord Hardwicke said, "But the present is a judicial sale of the estate, which takes it entirely out of the statute; the order of the Court was not interlocutory, but made part of the decree; as it always is on the matter reserved, though made at another day; and it includes as well the carrying the purchase into execution, as the establishment of the charity; amounting to a decree for the conveyance of the estate on one side, and a payment of the money on the other; who might be prosecuted for a contempt in not obeying that order. And it is stronger than the common case of purchasers before the Master, who are certainly out of the statute; nor should I doubt the carrying into execution against the representative, a purchase by a bidder before the Master without subscribing, after confirmation of the Master's report that he was the best purchaser, the judgment of the Court taking it out of the statute."

(c) 5th Ed. 197.

(d) 1 Ves. Sr. 221.

The deductions from this case are, that where a specific sale and purchase is decreed to be carried out the statute does not apply, for the very evident reason that there can be no doubt of the sentence of the Court; and where a Master certifies to a purchaser, similarly, the Court will decree the purchase to be completed, for the Master's report becomes a judgment by confirmation.

In *Lord v. Lord* (e) there was a sale under a decree. A bid was made by an unauthorized agent for B., and the Master reported that B. was the purchaser. B. died without having adopted the purchase. An order *nisi* was made confirming the report. The Court refused to order the executors of B. to pay the purchase money, and on his declining to purchase discharged the order *nisi*, and directed a re-sale.

Att'y-Gen. v. Day is referred to in *Blagden v. Bradbear* (f), where Sir Wm. Grant, M.R., says, "It seems Lord Hardwicke had no idea that sales by auction generally are excepted; for the grounds upon which his Lordship states the exemption of judicial sales are not applicable to other sales by auction."

In *McAlpine v. Young* (g), Vankoughnet, C., laid it down that, when the bidding ceases, the person who had made the highest bid is, under the general orders of the Court, the purchaser, and, that neither the vendor nor the auctioneer, nor any one else, can interfere and deprive him of his position. That is simply a re-iteration of the standing condition of the Court. The point was not discussed, as far as the report shows, nor was it necessary for a decision of the case. This case was referred to in *O'Connor v. Woodward* (h), but the latter case does not add anything to the learning on the subject. In both cases there was no doubt as to who the highest bidder was; the regularity of the sale in each case was questioned. Though a purchaser at an auction held by a vendor must prove a sale by a writing signed by the vendor (i), it is quite possible that a bidder appealing to the Court under the standing con-

(e) 1 Sim. 503.

(f) 12 Ves. 472.

(g) 2 Chy. Cham. 171.

(h) 6 P. R. 223.

(i) *Stammers v. O'Donohue*, 28 Gr. 207; 8 App. R. 161; 4 C. L. T. 375.

ditions might have the right to be declared the highest bidder for the purpose of having his name inserted in the report as purchaser. There never could be any signature by the vendor in a judicial sale; the Court being the vendor acts on its decree or judgment in carrying out the sale. But this by no means establishes that the Court will hold a bidder to a sale on a verbal offer. There would be precisely the same danger of fraud and perjury in endeavouring to prove the bidding at an auction held under order of a Court as at any other auction, there being no officer of the Court present to certify the highest bidder. The reasons given by Lord Hardwicke in *Attorney-General v. Day*, for not holding sales before a master to be within the statute, are by no means applicable to sales by auction not held before a master or other officer of the Court, who may avert the danger of perjury by immediately certifying the highest bidder.

There is one case in which a bidder was held to his bid under the condition in question, but upon peculiar grounds. In *Freer v. Rimner (j)*, an estate was ordered to be sold with the consent of a mortgagee, who was not a party to the cause. The mortgagee's solicitor bid at the sale. He subsequently moved to be discharged on the ground that he had retracted his bidding before the hammer fell. Sir L. Shadwell, V.C., refused the motion with costs, "on the ground that, as the estate had been sold with the mortgagee's consent, his solicitor ought not to be allowed to defeat the sale." Lord St. Leonards interprets this case as showing that the condition is binding upon persons who consent to the sale and their agents (*k*). Campbell (*l*) looks upon it as an "antecedent contract embodying the conditions of sale, as would be the case where he [the purchaser] is a consenting party to a family arrangement whereby (under the order of the Court or otherwise) the sale takes place." A person previously agreeing to the condition would be bound by it at the sale. But as to strangers, *quære*.

(j) 14 Sim. 391.

(k) Sug. V. & P. 14.

(l) On Sale, 142.

EDITORIAL REVIEW.

Settling Judgments.

Rule 416 has been interpreted in *Holden v. Smith*, (ante p. 541). By rule 50 "all proceedings to final judgment in actions shall be carried on in the office from which the writ of summons was issued, except where by any Rules of Court it may be otherwise provided, or where a Court or Judge shall otherwise direct." By Rule 416, "Two of the officers of the High Court shall, in addition to their other duties, be judgment clerks of the High Court, for the purpose of settling the form and terms of such special judgments as may be referred to them for the purpose by any Divisional Court or a Judge of any Division, or by the Master in Chambers."

Under Rule 50 judgments have been settled and entered by the local registrars. The policy of the Judicature Act is to decentralize business, and send local matters to the local masters; *Aitken v. Wilson*, 9 P. R. 75. Rule 416 was intended to cover the case of special judgments, by which is no doubt meant such judgments as are of a complicated nature, or such as require special knowledge of law and practice in order to frame them.

One would have supposed that a certain analogy existed between referring judgments for settlement under this Rule, and varying minutes. Where minutes have been settled by a judgment clerk, and either party is dissatisfied, the judgment clerk should be informed thereof, and a motion should then be made to vary the minutes; and the application should be made before the judgment is entered; 1 Holm. Rules, 6. After a judgment has been entered it can, as a general rule, only be varied on appeal or rehearing, except in cases of clerical mistakes or errors, arising from any accidental slip or omission, which may be corrected on

motion without appeal; *Ibid.* 8; or on the ground that it does not conform to the judgment as pronounced.

Holden v. Smith shows that the entry of the judgment is no bar to the reference to a judgment clerk to settle the form of the judgment. That this is attended with a certain amount of inconvenience is at once apparent, as well as that it puts in the hands of the judgment clerks a power that did not previously exist except in the Court or a Judge, and then only exercisable to correct clerical errors, etc., or to make the judgment as entered conform to the judgment as pronounced. The practice as settled by *Holden v. Smith* requires that a subsequent application should be made to the Court to amend the judgment so as to conform to the newly settled minutes. But no provision is made by the Rules for such an event; and this is some indication of an intention that the settling by the judgment clerk should be done before entering the judgment.

The result of this case will probably be that in almost every country cause, in the Chancery Division at least, an application will be made to the Master in Chambers to refer the judgment to a judgment clerk for settlement. For no prudent litigant will accept a judgment settled and entered in the local Registrar's office when three months afterwards he may be startled by having his judgment reviewed and amended at his cost, with the probable result that both he and the Sheriff will have to bear the consequences of having proceeded upon a judgment wrongly entered. And the policy of decentralization is in this case reversed. *Quære*, whether the judgment as settled by the judgment clerk should be entered at Toronto or in the office from which the writ of summons issued.

The Frontenac Law Association.

The newspaper report of the proceedings of the Frontenac Law Association do not show that the Profession in Frontenac are happy and contented with their lot. The Association disapproves of the Law School at Osgoode Hall, which, they say, confers little or no benefit upon

students outside Toronto, and is maintained at large expense (\$2,400 annually) which could be much better applied otherwise. This is the same old objection that has always been raised to the Law School, and which once killed it outright. "If we can't have a Law School in every county we won't allow one to exist at Osgoode Hall." A like liberal policy in educational matters would pull down the University of Toronto. Our friends in Kingston went about their grievance in a more manly way some time ago (see 1 C. L. T. 94) when they made an effort to establish a course of lectures at the University of Queen's College. Whether it failed or not we cannot say.

The objection to the expense of the present Law School is not well founded. The lecturers would be glad if such a cause of grumbling did exist. The Law Society of Upper Canada provides every year, out of its revenue of \$47,000, or thereabouts, \$800 a year for four lecturers. Each lecturer in return for his \$200, delivers twenty lectures, and takes his part in superintending the examination at the end of the session. No one can say that the lecturers are overpaid, and when these facts are regarded the amount devoted to the education of the students looks small. But it is not much larger than the amount spent last year (\$737.82) for Term luncheons (see 20 C. L. J. 102) and no one grumbles about that item.

Swearing Affidavits before Partners.

The rule that affidavits in a matter or action shall not be sworn before the Solicitor of the party on whose behalf they are made, or before his partner, has been generally supposed to apply to such affidavits only, and it has been the common practice for affidavits to prove deeds for registration to be sworn, and statutory declarations to be made, before the solicitor of the interested party or his partner. The *Law Journal* (15th November, 1884) says, "A question arose whether this rule applied to statutory declarations. and the Incorporated Law Society, in March last, addressed a question to the Lord Chancellor on the subject. The Lord

Chancellor's reply was that, 'although the rule cited does not appear to refer to business done otherwise than in a cause or matter, the principle applies to all cases, and a Solicitor should not act as a Commissioner in any case in which he is directly or indirectly interested or in which he is acting.' "

Before the Judicature Act the matter was governed in the Common Law Courts by Reg. Gen. 114. In Chancery it rested upon general principles apparently: *Dunn v. McLean*, 6 P. R. 95. Since the Judicature Act there is no written rule; but the practice is still observed. There is all the more reason therefore why it should be universal.

Commons Error Fault Jus.

We may add to our collection of cases on this maxim the following extract from *Emmerson v. Heelis*, 2 Taun. 45:— "*Shepherd, Serjt.* Various reasons have been assigned for the decision in *Simon v. Metivier* (1 W. Bl.), but none of the subsequent cases have recognized that it was well decided, if it goes to establish the broker's agency for the buyer; the cases only say, that an auctioneer is not the buyer's agent in a purchase of land. [*Mansfield, C. J.* Perhaps it is a great misfortune that that case was not overturned before any others were decided on it; but it has again and again been acted on. *Lawrence, J.* In 7 E. 569, *Hinde v. Whitehouse*, Lord Ellenborough, C. J., said that 'In respect to sales of goods, it had been uniformly holden that a broker was an agent of both parties ever since the case of *Simon v. Metivier*; and it would be dangerous to break in upon a rule which affects all sales made by brokers acting between the parties buying and selling.' It is impossible to say how many hundred thousands of pounds may at this moment depend on that case.] *Shepherd* admitted that he had heard Lord Eldon, C. J., rule the same point at *nisi prius*, and abandoned the position."

Dominion Silk.

The Governor General has been pleased to appoint the following Queen's Counsel:—J. S. Ewart, S. C. Biggs, H. M. Howell, and J. A. M. Aikins, all of Winnipeg.

We look upon the honour to Mr. Ewart as a distinct recognition of his services to professional literature.

Mr. Biggs, Q. C., will also be remembered by our readers as an ardent lover of statistical literature.

The other two gentlemen are amongst the most prominent men at the Manitoba Bar, and the wonder is that they did not receive the honour before.

Judicial Appointment.

Mr. J. M. Hamilton, District Judge of Thunder Bay Judicial District has been gazetted a local Judge of the High Court of Justice.

BOOK REVIEWS.

A Digest of the Reported Cases determined in the Superior Courts of Ontario, and the Supreme Court of Canada, etc., etc. Compiled by order of the Law Society of Upper Canada, by CHRISTOPHER ROBINSON, Esq., one of Her Majesty's Counsel, and F. J. JOSEPH, Esq., of Osgoode Hall, Barrister-at-Law. Toronto: Rowsell & Hutchison, 1884.

This work is a continuation of Robinson and Joseph's Digest, and contains the cases reported in 45 and 46 U. C. R.; 31 and 32 C. P.; 27 to 29 Gr.; 5 to 8 App. R.; 1 to 4 Ont. R.; 8 and 9 P. R.; 3 to 7 S. C. R.; and 1 Hodg. It also contains a table of cases affirmed, reversed, or specially considered.

The patient labour of years was expended by Messrs. Robinson and Joseph in the preparation of their Digest of the cases contained in one hundred and twenty-eight volumes of reports—a work undertaken purely as a private enterprise—which brought within the horizon the whole of the case law of the Province. That work completed, a continuation of the Digest became a matter of course; and the future labour in bringing it out in triennial parts, was in comparison with the former work, a light task. The private enterprise and industry which so successfully brought to completion the larger Digest, might well have been left to enjoy the profit to arise from the lighter task. However, the Law Society has now taken out of the hands of the Editors the best selling, because the most necessary, work published in this Province. The advantage to the Profession, by reason of their getting it at a reduced price, is of course a great one, and more thoroughly appreciated than some of the best intended efforts of the Benchers to make a just and profitable disposition of the funds of the Society.

With respect to the character of the work, we can *only* say that this Digest is in all respects modelled upon the plan of Robinson and Joseph. With the exception of a very few errors, that work has been found to be most reliable, and it is safe to predict the usefulness and reliability of the present publication. There is one improvement which should be introduced into the next issue, viz., the indexing of cases by defendants' names as well as plaintiffs'. It not infrequently happens that one can recollect the name of the defendant, but not that of the plaintiff, and in such an event the index is practically useless. Every facility should be afforded for finding a friend in the vast crowd of decisions.

The Law Society has arranged with the publishers to sell to every member of the Society applying directly to the publishers up to 15th February next, one copy at \$3 in cloth, or \$4 in half calf. After that date it will be placed on the market at \$5 cloth, or \$6 half calf.

The Law of Mortgages of Real and Personal Property, including also the law of pawn or pledge and collateral securities, as determined by the Courts of England and the United States. By CHARLES T. BOONE, LL.B., author of "Law of Corporations," "Real Property," etc. San Francisco: Sumner, Whitney & Co., 1884.

This is one of those little volumes of "The Practitioner's Series" which remind us of bales of compressed hay. All the law that the learned author can lay his hands on is squeezed into the smallest compass possible, by rejecting every unnecessary word in the statements of successive bald propositions of law. The authorities are collected in notes at the end of each section. The danger of condensing is that the text, or rather the references (for the text is little more), may mislead, where more elaborate sentences would explain. But it is due to the learned writer to say, that he expresses himself with great clearness, considering his economy of language.

Speeches, Arguments, and Miscellaneous Papers of David Dudley Field. Edited by A. P. Sprague. New York: D. Appleton & Co., 1884.

Mr. Field has a mind of great compass—a diversity of talent—but the same speech. We have read with great pleasure, respect, and admiration, arguments, speeches, articles; but there is a similarity of tone in all of them which is disappointing. The arguments might be articles, but for the occasional references to the Court; and the articles might be arguments, such as the arguments are. But such as the arguments are, one might almost fulfil ambition by delivering one. There is impulsive force in them, but to the writer there appears to be evident effort in the choice of language.

As a law reformer and a conscientious and pure statesman, Mr. Field should be as well known as in his character of advocate; and an attentive perusal of his political articles would heighten the tone of politicians if only they also adhered to them.

The Principles of Equity, intended for the use of Students and the Profession. By EDMUND T. H. SNELL, of the Middle Temple, Barrister-at-Law. Seventh Edition. To which is added an epitome of the Equity Practice. Fourth Edition. By ARCHIBALD BROWN, M.A., Edin. and Oxon., and B.C.L., Oxon., of the Middle Temple, Barrister-at-Law. London: Stevens & Haynes, 1884.

This standard text-book has a grasp upon the Profession that cannot be shaken off. The edition before the present one was published in 1882, and is, we believe, exhausted. The work is so well known and so highly appreciated that praise would be out of place.

Questions on Equity, for Students preparing for examination. Founded on Snell's Principles of Equity. By W. T. WAITE, Barrister-at-Law; Holt Scholar of the Honour-

able Society of Gray's Inn. Second Edition. London: Stevens & Haynes, 1884.

This work is prepared from the seventh edition of Snell's Equity. Its usefulness to students is problematical; but as a stimulant to a jaded examiner, who Term after Term tries to extract new questions from the same text-book, it will prove its usefulness.

Lewis' Ontario Statute Index, being an alphabetical index of the Statutes of the Province of Ontario, down to and inclusive of the year 1884, including the Revised Statutes. By EDWARD NORMAN LEWIS, of Osgoode Hall, Barrister-at-Law. Toronto: Carswell & Co., 1884.

This is as complete a labour-saving machine as could be devised for office use. The learned author will pardon our calling it a machine, but above that it cannot rise. You cannot throw into an index pathos, purity of diction, or poetic phrase; but you can make it eminently useful. And useful this index will be. Some of the titles are fanciful, but there are so many cross-headings with original page references, that one is not at a loss to find what is wanted, and that rapidly. The book should be in every practitioner's hand—or on his shelf.

The Law and Medical Men. By R. VASHON ROGERS, JR., of Osgoode Hall, Barrister-at-Law. Toronto, Canada, and Edinburgh, Scotland: Carswell & Co., 1884.

Mr. Rogers has a quaint way of choosing subjects for his pen. But withal he brings together such useful material in such an attractive style that one cannot help reading it. We readily recognize some of the chapters in this work as having appeared in the guise of articles in several Law periodicals, and having read them there once, we do not propose to peruse them again. But there is a great deal in the book that has not been hitherto published and is very readable and useful.

CORRESPONDENCE.

COMMUNIS ERROR FACIT JUS.

To the Editor of the Canadian Law Times :

SIR,—In further confirmation of the views expressed in your article respecting the maxim *Communis error facit jus* not being confined exclusively to questions of conveyancing, the recent case of *Palmer v. Johnson*, 13 Q. B. D. 151, may be referred to, where the question before the Court was whether a contract for compensation in the event of errors being discovered in the conditions of sale could be enforced after conveyance, it having been decided in 1880 by a Court of first instance that the action would lie. Brett, M.R., said, "One cannot but say that this Court (*i. e.*, the Court of Appeal), according to what has been a universal practice even of a Court of Error, would decide now in the same way, even though it would not have come originally to the same conclusion."

It has been openly avowed by some of the learned Judges of the Privy Council that its decisions in some cases have been dictated by policy. Is it not possible that "policy" more than pure law may have had something to do with the decision in *McLaren v. Caldwell*? Is it not possible in fact that the keynote of the judgment is really to be found in the observation of Burton, J.A., that any other decision "could not have been otherwise than disastrous to one of the most important industries in the Dominion"? Indeed, it has been rumoured, that by a judicious use of this argument *ad hominem* the learned counsel for the respondent had practically won his case on the motion for leave to appeal.

Yours, etc.,

REVIEW OF EXCHANGES.

Irish Law Times.—29th March, 1884.

Conditions tending to Perpetuities. The decision of North, J., in *Dunn v. Flood*, 49 L. T. N. S. 670, is questioned.

Ibid.—12th April, 1884.

Property in Public Lectures. An undelivered lecture, which has been reduced to writing, has the same right to protection from unauthorized publication by a stranger that is possessed by every unpublished manuscript. There exists a right of property in it. The mere delivery of a lecture to a class of students does not divest this right of property, and whatever use the class may make of the information conveyed by the lecture, they cannot reproduce it in print or by oral delivery, as there is an implied contract that the communication of the views of the professor is personal to the members of the class.

Ibid.—19th April, 1884.

Evidence of Husbands and Wives. The question is considered whether a husband can be called as a witness in a criminal prosecution against his wife for stealing his goods. The ambiguity of certain clauses in the Married Women's Property Act, 1882, is criticised.

Ibid.—26th April, 1884.

Negligent Custody of Title Deeds by Legal Mortgagee.—I. What conduct in relation to title deeds, on the part of a mortgagee who has the legal estate, is sufficient to postpone his mortgage in favour of a subsequent equitable mortgagee who has obtained the title deeds without knowledge of the legal mortgage? The cases are examined, and the propositions established by them formulated at length.

Ibid.—3rd May, 1884.

Negligent Custody of Title Deeds by Legal Mortgagee.—II. A continuation of the article upon this subject in the last number.

Ibid.—10th May, 1884.

Covenants for Perpetual Renewal of Leases. The rule of construction laid down by Lord Brougham in *Browne v. Tighe*, 2 Cl. & F. 416, is declared to be modified by later cases, which are referred to.

Ibid.—17th May, 1884.

Costs of Solicitor litigating in Person. In the recent case of *London Scottish Permanent Benefit Society v. Chorley*, 50 L. T. N. S. 265, the right of a solicitor who successfully conducts his own case to tax his costs as a solicitor, and not merely his costs out of pocket, was questioned. The weight of authority is in favour of the right, which has been recognized in the Chancery Division and the Court of Chancery for many years. The leading authorities upon the question are examined.

Ibid.—14th June, 1884.

Pleading Facts relied on to establish Title. A discussion of the cases bearing upon the rule which requires the pleader to state the material facts upon which the party relies, without detailing the mere evidence by which these facts are to be proved. No very decided opinion is expressed, though the views taken in the adjudged cases in England and Ireland are given.

Ibid.—12th July, 1884.

Solicitor's Retainer for Plaintiff. Remarks upon the care a solicitor should exercise to have his retainer in writing and carefully worded to authorize fully all services he is about to perform for his client. The care should be greater where the client is an uneducated person. Neglect of this precaution may subject the solicitor to an order staying the proceedings undertaken, with costs to be paid personally by the solicitor. *Wray v. Knapp*, 50 L. T. N. S. 552, and earlier cases are cited and commented upon.

Law Journal.—29th March, 1884.

Rights between Dominant and Servient Tenements. In the case of *Goodhart v. Hyett*, reported in the March number of the *Law Journal Report*, it was determined that the owner of land subject to an easement of carrying water in pipes for the benefit of the owner of adjoining land cannot build over the pipes; and an injunction was awarded on the ground that to allow such building would practically destroy the easement, because the owner of the easement would be prevented from mending his pipes if they fell out of repair, and it was held unreasonable to expect that the owner of the easement should repair the pipes underneath the house. The importance of this decision as reducing considerably the value of building property which may be subject to an easement of this kind, if to be accepted as embodying a broad principle of law, is noted, and its soundness questioned. The propriety of the inferences drawn by the learned judge from the facts proved is commented upon, and the opinion expressed that the decision can have no general application.

Ibid.—12th April, 1884.

The Court of Appeal and Inferior Courts. "Few will support the principle of appeals on leave being given by the Court appealed from, and fewer still will support them in the light of the view now, we

think, universally taken, of the functions of the Court proposed to be appealed from. The common form of answer to a request for leave to appeal is, 'we have no doubt about the case, and think there ought to be no leave to appeal.' This stereotyped answer is little affected even by the experience of what happened in *Bradley v. Baylis*, 51 L. J. R. Q. B. 183, where an appeal was refused in the first instance, but afterwards granted on the discovery of the extraordinary importance of the decision, and where five judges in the Court of Appeal unanimously over-ruled the confident opinion of the two judges in the Court below. We respectfully submit that the absence of doubt in the Judge's mind is no reason for refusing leave to appeal when an important point of law is raised. No Court ever decides a purely elementary question, and the mere fact that a point of law is taken to a Court at all is evidence of the existence of a doubt. If a decision affects a large number of the Queen's subjects, or deeply affects the particular parties in a pecuniary or other way, we submit that leave to appeal ought not to be refused. Leave is required in order to prevent frivolous appeals, and not to gauge the state of mind, whether confident or dubitant, of the Judge immediately after he has given his opinion. If he gives it totally without doubt, he may well the more mistrust its soundness."

Ibid.—26th April, 1884.

The Law of Cremation. In *Williams v. Williams*, 51 L. J. R. Chy. 385, Mr. Justice Kay expressed the opinion (though he did not decide the point) that cremation, as a method of disposing of the bodies of the dead, is not legal according to the law of England. In the later case of *Regina v. Price*, reported in the April number of the Law Journal Report, Mr. Justice Stephen decides the contrary. Cremation *per se*, he holds, is not illegal, and is not the subject of an indictment unless the act be attended by such circumstances as to make it amount to a public nuisance. The learned Judge states that he has been able to find no decision to the contrary. While Courts have sometimes declared acts to be misdemeanours, which have never previously been decided to be so, yet such cases all involve great public mischief or moral scandal. "I do not think that it can be said that every practice which startles and jars upon the religious sentiments of the majority of the population is for that reason a misdemeanour at common law."

Ibid.—10th May, 1884.

Strikes and Apprenticeship Deeds. In *Meakin v. Morris*, reported in the May number of the Law Journal Reports, it was decided that an agreement by the apprentice in the deed that during a strike the master shall not be liable to find work for the apprentice, or pay him wages, is an agreement so greatly contrary to the apprentice's interest that the law in his interest as a minor pronounces the whole deed null and void. This case is examined and shown to conflict with an earlier decision of the same Court.

THE
CANADIAN LAW TIMES.

OCCASIONAL NOTES.

ONTARIO.

High Court of Justice.

QUEEN'S BENCH DIVISION.

[THE DIVISIONAL COURT, 21ST NOV., 18

HILLIARD v. ARTHUR.

Setting aside judgment—Rule 270.

The judgment of Rose, J., 10 P. R. 281; 4 C. L. T. 352,] was affirmed.

W. H. P. Clement, for the appeal.

Aylesworth, contra.

[24TH NOVEMBER, 1884.

Re FRIENDLY v. NEEDLER.

Division Court—Prohibition—Discretion.

The judgment of Rose, J., 4 C. L. T. 352, was affirmed.

Walter Read, for the appeal.

Wallace Nesbitt, contra.

[28TH NOVEMBER, 1884.]

REGINA v. BUNTING.

*Ontario Judicature Act—Constitution of Courts—Criminal proceedings—
Removal of indictment by certiorari—Practice.*

An indictment was found against the defendants in the High Court of Justice at its sittings of Oyer and Terminer and Gaol Delivery, and on being called upon to plead, the defendants demurred to the indictment. A writ of certiorari was subsequently obtained by the defendants, in obedience to which the indictment demurrer and joinder were removed to the Queen's Bench Division of the High Court of Justice. Upon the return, the Crown took out a side bar rule for a *concilium* and the demurrer was set down for argument. A motion was made by the defendants to set aside the proceedings of the Crown on the ground that they should have been called upon to appear and plead *de novo* in this Division.

Held, Wilson, C. J., dissenting, that the Court of Oyer and Terminer is now, by virtue of the Judicature Act, the High Court of Justice; that the indictment was found, and the defendants appeared and demurred thereto in the High Court of Justice; and that it was not necessary to plead *de novo* to the indictment.

Per Armour, J., and O'Connor, J. The Supreme Court of Judicature is not properly a Court, and ought more properly to have been called the Snpreme Council of Judicature. The Divisions of the High Court are not themselves Courts, but together constitute the High Court, which is thus divided for the convenience of transacting business; and the Judges sit as Judges of the High Court and exercise the jurisdiction and administer the functions of the High Court.

The recognizance entered into by the defendants, on the removal of the proceedings to this Division, provided that they should "appear in this Court, answer and comply with any judgment which may be given upon or in reference to a certain indictment, etc., or upon or in reference to the demurrer to such indictment, and plead to said indictment if so required, etc."

Per Wilson, C. J. *Semble*, that the practice and procedure before the Judicature Act should be maintained in its entirety; though possibly it might be varied by agreement. By the recognizance the defendants had not agreed to vary it; but they might thereunder elect to appear and answer to the indictment, or to appear and argue the demurrer; and they, being ready to appear and answer the indictment, would fully perform the condition of the recognizance by so doing.

Bethune, Q.C., and Irving, Q.C., for the Crown.

Richards, Q.C., McCarthy, Q.C., and Foster, for the defendants.

[OSLER, J. A., 31ST OCTOBER, 1884.]

REGINA v. YOUNG.

*Liquor License Act—Conviction by two magistrates—Onus of proving license—
Imprisonment in default of distress—Selling liquor to Indian.*

A conviction made under R. S. O. cap. 181, for selling liquor without a license, purporting to be made by three magistrates but signed by two only was returned with a certiorari.

Held, if an objection at all, a ground for sending back the writ that the third magistrate might sign the conviction, but not ground for quashing it, But

Held, that a conviction by two Justices under this Act is good.

By R. S. O. cap. 181, sec. 85, where the act or omission complained of is one for which, if the defendant were not duly licensed he would be liable to a penalty under the Act, the burden of proving that he is licensed is on the defendant.

Held, no objection to a conviction that it did not show the facts as to the defendant's license.

A penalty of thirty days' imprisonment in default of sufficient distress for the fine was imposed.

Held, good under sections 51 and 59 of the Act.

That the offence was selling liquor to an Indian.

Held, no objection to a conviction under R. S. O. cap. 181, for, if so, the defendant was guilty of two offences, one under the latter act and one under the Indian Act.

Judicial notice taken that Caledonia is in the County of Haldimand.

[11TH NOVEMBER, 1884.]

MACLAREN v. COMMERCIAL UNION INS. Co.

Fire insurance—Damage by removal of goods—Total loss—Salvage.

The plaintiff's stock in trade was insured against loss by fire in the defendant Company. A fire occurred in an adjoining building, and the plaintiff's warehouse being consequently in danger of destruction by fire, he removed his stock, which was thereby damaged. On a special case,

Held, that the damage occasioned by the removal was a loss covered by the policy, and not salvage to which the defendants were liable to contribute under the fifth statutory condition, which declares that in case of removal of the property to escape conflagration the company will rateably contribute to the loss and expenses attending such act of salvage.

Moss, Q. C., for the plaintiff.

W. A. Reeve, for the defendants.

[ROSE, J., 20TH NOVEMBER, 1884.]

REGINA v. JAMIESON.

Lottery Act, C. S. C., cap. 95—Giving prizes for guessing number of buttons in glass jar—Quashing conviction—Costs.

The defendant placed in his shop window a globular glass jar, securely sealed, containing a number of buttons of different sizes. He offered to the person who should guess the number nearest to the number of buttons in the jar, a pony and cart which he exhibited in his window, stipulating that the successful one should buy a certain amount of his goods.

Held that, as the approximation of the number of buttons depended upon the exercise of judgment, habits of observation, and mental effort, this was not a mode of chance for the disposal of property within the meaning of the Act.

Quære, whether a defendant should not get the costs of quashing a tentative conviction.

Fenton, for the Crown.

T. C. L. Armstrong, for the defendant.

CHANCERY DIVISION.

[WILSON, C.]

WEST v. PARKDALE.

CARROLL v. PARKDALE.

Municipality—Ultra vires—Performing work outside limits—Trespass.

By 46 Vict. cap. 45 (O.), it was provided that the City of Toronto and the Village of Parkdale might agree to construct a subway beneath the several railways which intersect Queen street at and about the limit between Toronto and Parkdale, with power to expropriate and compensate property owners, etc. By an order of the Governor-General in Council, passed in pursuance of 46 Vict. cap. 24, the Railway Companies whose railways crossed Queen street were authorized to construct the subway; and the order recited a previous agreement by the Village of Parkdale to undertake the work. It was agreed between the Village and the Railway Companies that the Village should construct the subway and that the expenses should be shared equally. The Village, in performing the work, destroyed the frontage of the plaintiffs' land, which was in the City of Toronto.

Held, that the Village of Parkdale were not acting under the Ontario Statute but under the order in Council; that they could not exceed their powers as a municipality, and that they were therefore wrongdoers with respect to the work done in the City of Toronto, and were liable as such for the damage done to the plaintiffs' property.

S. H. Blake, Q.C., Lash, Q.C., and Snelling, for the plaintiffs.

Robinson, Q.C., Foster, and Proctor, for the City of Toronto.

Ostler, Q.C., and J. H. Macdonald, for the Village of Parkdale.

[BOYD, C., 22ND OCTOBER, 1884.]

GILLEN v. THE R. C. E. CORPORATION OF KINGSTON.*Mortgage—Custody of—Payments made to a solicitor—Agency—Adoption of payments.*

G., a mortgagee, left her mortgage in the office of M., her solicitor; and F., the mortgagor, paid the interest and \$3,000 on account of principal to M., who paid over the interest but retained the \$3,000 without saying anything about it. F. subsequently paid a further sum of \$1,500 on account of principal, and other sums of interest, all of which were paid over to G.

In a mortgage suit by G., the defendants set up that M. was the duly authorized agent to receive the sums paid to him for principal and interest, and it was contended that the subsequent receipt of the \$1,500 and interest by G. was an adoption of the previous payment.

Held, that the custody of a mortgage confers no right whatever to the custodian to receive any part of the principal or interest secured. A mortgage not only secures money but it affects the land, and so for its effectual discharge not only payment but reconveyance is essential, and for this reason the law does not infer a right to receive the money from the mere possession of this kind of security. The adoption of a later payment of principal cannot be held to ratify a prior unknown payment, unless possibly it could be shown that there was an intention to adopt all the payments or that the position of the mortgagor was altered for the worse.

Cassels, Q.C., for the plaintiff.

Moss, Q.C., and *Burdett*, for the defendants.

[5TH NOVEMBER, 1884.]

TRAISER v. HAIGHT.*Legacy—Receipt—Costs.*

J. B., being the owner of certain land, by his will gave his son M. B. a legacy of \$150, and charged it on the land, which he devised to his son W. B., an infant, with a provision that his son J. B. should occupy it during the minority of W. B. and pay the legacy. The land was so occupied and the legacy paid, and a receipt for its payment taken. W. B. subsequently sold the land to T. B., and T. B. sold it to J. C., who retained \$150 of the purchase money because the legacy was not released, but by an agreement agreed to pay T. B. the \$150 as soon as he should furnish a release duly executed by M. B. The right to receive the \$150 under this agreement and any right that he had to get this release was assigned by T. B. to M. K., who then tendered a release for execution to T. B., and the latter declined to execute it.

Held, that, although the plaintiff was entitled to a judgment declaring that the legacy was paid, which might be registered, still as the defendant had done no wrong and had given a receipt for the legacy when it was paid, he was not compellable to sign anything else, and should not be

punished by being ordered to pay the costs for not doing that which he was not bound in law to do. The purchaser should not have objected to the title on account of the legacy if there was proof of its being paid.

T. H. Bull, for the plaintiff.

[PROUDFOOT, J., 2ND OCTOBER, 1884.]

In re MORTON AND TRUSTEES Y. S. M. CHURCH.

Vendor and purchaser—Tax sale—Evidence between vendor and purchaser.

The vendor claimed title to the land in question by virtue of a tax sale and conveyance. More than two years had elapsed since the tax deed without the sale being questioned. The records of the assessment, arrears of taxes, non-payment, and sale which appeared in the Treasurer's office were regular. The purchasers required the vendor to produce conclusive evidence that the former owner had not paid the taxes. The vendor claimed that the records of the Treasurer's office, being regular, afforded *prima facie* evidence of the payment of the taxes and the validity of the sale, and that no further evidence could be called for.

Held, that the records of the Treasurer's office, being regular, were sufficient evidence of non-payment of taxes, and of the validity of the sale, when supplemented by a certificate of the County Treasurer that the lands had not been redeemed by the former owner within the year after sale allowed for redemption.

E. Douglas Armour, for the vendor.

F. E. Hodgins, for the purchasers.

[FERGUSON, J., 14TH JULY, 1884.]

GLASS v. BURT.

Husband and wife—Bond by husband in favour of wife—No consideration—Action on bond.

Held, that an action would not lie, at the suit of the obligee of a bond (the widow of the obligor) against the obligor's executors, where there was no consideration for the bond.

Van Norman, Q.C., for the plaintiff.

Cassels, Q.C., for the defendants.

[16TH SEPTEMBER, 1884.]

TOWNSHIP OF ELDERSLIE v. VILLAGE OF PAISLEY.

Municipalities — Separation — School Board — Debenture debt — Duty of junior municipality to pay to senior municipality—Action for money had and received—Costs.

The trustees of school section No. 1 of Elderslie and Greenock having applied for authority to borrow money for a school house and site, the plaintiffs passed the necessary by-law, under which debentures were issued

and sold. Shortly afterwards the Village of Paisley was erected out of a portion of the plaintiffs' municipality. By 36 Vict. cap. 48, secs. 53 and 56, after the incorporation of the defendant municipality, it became liable to levy a rate for its proportion of the debt, and to pay the same to the plaintiff municipality. Instead of doing so, they levied the rate and paid the money to the Secretary-Treasurer of the School Board, following the example of the plaintiff municipality, which had so paid the money raised by them before the separation of the defendant municipality. When the debentures matured it was found that the Secretary-Treasurer of the School Board could not account for the money received by him.

Held, that the plaintiffs were entitled to an account from the defendants of all moneys received by them for the six years previous to action (the Statute of Limitations having been pleaded), and to recover from them the amount without interest as money had and received for the plaintiffs, their duty having been to pay the money directly to the plaintiffs.

The Court refused costs to the plaintiffs on account of their negligence.

Cassels, Q.C., and *H. P. O'Connor*, for the plaintiffs.

Moss, Q.C., and *Shaw, Q.C.*, for the defendants.

[NOVEMBER 17TH, 1884.]

REGAN v. SING.

Contract for sale of land—Authority to agent—Conditional acceptance of offer.

C. R. S., being the owner of certain leasehold property, wrote E. E. K., a land agent, a letter in these words:—"Please call on J. J. R. He keeps a small shop. . . . He resides in my house on P. street, and has been wanting to purchase it for some time. Tell him if he gives me \$235 cash at once, I will send the papers to you for him, and he can pay over the money to you. Please write me by return mail." On the following day E. E. K. wrote J. J. R. as follows:—"Mr. S., of Meaford, wishes me to say, that if you desire to purchase some property he owns on P. street, if you give him \$235 cash, he will send the deeds to me and deliver them to you. Your early reply will very much oblige." About a month after, an acceptance was endorsed on the latter letter, in these words:—"I hereby accept the above on the understanding that I pay no expenses," and it was signed by J. J. R.

Held, in an action for specific performance by J. J. R. against C. R. S., that the letter from C. R. S. did not contain authority to E. E. K. to enter into a contract for the sale of the property.

Held, also, that even if there had been no question as to the authority of E. E. K., the insertion of the words, "on the understanding that I pay no expenses," in the acceptance, prevented it from being considered an acceptance of the offer said to be contained in the letter of E. E. K.

Murdoch, for the plaintiff.

H. J. Scott, Q.C., for the defendant.

IN CHAMBERS.

[BOYD, C., 1ST NOVEMBER, 1884.]

TRINITY COLLEGE v. HILL.

Opening foreclosure—Account—Costs.

A petition to open foreclosure after a great lapse of time, and after the land had been purchased from the plaintiffs, who had the final order of foreclosure, was refused with costs. The plaintiffs taxed their costs and issued execution therefor, claiming interest thereon. The Court of Appeal reversed the order refusing the petition, and allowed the petitioner to redeem "on payment into Court of principal, interest and costs and subsequent interest and subsequent costs, including the plaintiffs' taxed costs of the petition herein, and on payment to the purchaser of the amount of costs incurred by him in and about the purchase of the said premises and also in this action." The Master, in taking the account, allowed the plaintiffs their costs as they had been taxed on the order refusing the petition, costs of the execution, and interest thereon; and to the purchaser his costs of petition, execution, and interest thereon.

Held, reversing the Master's ruling, that as the plaintiffs' costs of refusing the petition were not recoverable under the order refusing the petition, but under the judgment in appeal, as a condition precedent to redeeming; and as the amount formerly taxed was adopted merely to save another taxation, the costs of the writ and interest on the costs were improperly allowed. But

Held, affirming his ruling, that the purchaser's costs of the execution etc., were costs "incurred in this action," and that he was entitled to be paid them.

Bain, Q.C., for the appellant.

VanKoughnet, Q.C., for the plaintiffs.

J. B. O'Brian, for the purchaser.

[3RD NOVEMBER, 1884.]

*In re WALKER, A SOLICITOR.**Solicitor and client—Taxation—Effect of payment—Special circumstances.*

Held, that, after payment of a solicitor's bill, the Court will not disturb the bill on the ground of overcharge, unless it appears to be a case of gross and exorbitant claim amounting to fraud. But, before payment, it is enough if the items are unusual, or more than ordinarily large, so as to require justification, and if no such explanation is furnished, then a reference will be ordered.

The following circumstances were held not to be special circumstances which would entitle the client to tax the bills after a year from the delivery, because these circumstances could be as well considered at the trial of

the action as on a reference to a taxing officer, viz., (i) That the bills sued on contained certain items included in other bills paid by the client; (ii) That some work was charged for which was never done; (iii) That a payment of \$200 on account by the client was disputed.

Held, however, that the conjunction of the following circumstances, viz., that the relationship of solicitor and client was continued after delivery of the bills, that there was an offer by the solicitor to make a substantial deduction from the bills sued on, and that there were items of apparent overcharge as to which no explanation was offered by the solicitor, supported the order for taxation.

The order of the Master in Chambers for taxation was affirmed.

Holman, for the appeal.

W. H. P. Clement, contra.

[10TH NOVEMBER, 1884.]

SMITH v. GREEY.

Patent of invention—Action for infringement—Particulars—Discovery.

A motion by the plaintiff to commit the defendants for unsatisfactory answers, on their examination for discovery before the trial, in an action to restrain the infringement of the plaintiff's patent, in which the validity of that patent was attacked by the defendants.

Held, that the general law applicable to discovery governs in patent cases.

A defendant may be properly interrogated as to the grounds of his attacking the plaintiff's patent, and there should be a fair and full disclosure of the particular lines of attack which are contemplated, but no such individualizing of the persons who are alleged to be prior users as would enable the plaintiff to fix upon the defendants' witnesses.

Howland, for the motion.

H. D. Gamble, contra.

[17TH NOVEMBER, 1884.]

LANGTRY v. DUMOULIN.

Taxation of costs—Appeal—Filing certificate of taxation.

Held, that the practice on appeals from the taxing officer is generally the same as that on appeals from the Master in Ordinary; and therefore the certificate of taxation should be filed before being acted on, or complained of by appeal.

The certificate of taxation was dated 14th October. On 15th October, at the request of the appellant, the taxing officer certified as to his ruling on the objections to the taxation lodged with him by the appellant.

Held, that the taxing officer should not certify *ex parte* in regard to hostile proceedings at the instance of either party, after he has made his

report or final certificate, when he becomes *functus officio*. It is only when the court requires to be informed upon any matter that he should further certify.

Held, also, that he may certify his ruling pending the taxation, and upon that an appeal will lie as in analogous cases of a master's separate or special report, but this right ceases when he has signed his final certificate.

Held, also, that the taxing officer should include in his certificate the points of objection to the taxation.

Arnoldi, for the appeal.

A. Hoskin, Q. C., and *E. Douglas Armour*, for respondents.

BINGHAM v. McKENZIE.

Changing venue—County court action—Jurisdiction of Master in Chambers.

On an appeal from an order of the Master in Chambers his jurisdiction to make an order changing the venue in a County Court action was doubted; and the order of the Master was also reversed on the merits.

Morson, for the appeal.

Shepley, contra.

FUCHES v. HAMILTON TRIBUNE Co.

Winding up order—Preferential claim for rent.

On a reference for winding up the defendant Company under 45 Vict. cap. 23 (D), the Local Master at Hamilton disallowed a claim made by the landlords of the defendants to be paid preferentially for nine months overdue rent.

Held, affirming the Master's ruling, that the rent having been overdue at the date of the commencement of the winding up proceedings, and no step having been taken by the landlords to assert their lien for rent till after that date, the court would not aid the landlords.

W. F. Walker, for the appeal.

Carscallen, contra.

[18TH NOVEMBER, 1884.]

SWEETMAN v. MORRISON.

Interpleader—Sheriff's costs—Security.

Held, that sec. 10 of the Interpleader Act, R. S. O. cap. 50, authorizes security to be ordered for the sheriff's costs, only in circumstances where it would be ordered as between ordinary litigants. The fact that the claimant was a married woman and in straitened circumstances was held insufficient to warrant an order for security for the sheriff's costs from her.

H. J. Scott, Q. C., for the appellant.

Aylesworth, for the sheriff.

Shepley, for the execution creditor.

[19TH NOVEMBER, 1884.]

In re ARMOUR; MOORE v. ARMOUR.*Administration—Representatives in this Province—Real estate—Summary application.*

Upon a summary application for an order for the administration of the real and personal estate of the testator, who died in Michigan, and whose will was proved there,

Held, that the practice of the Court is opposed to granting administration where representation has not been obtained in this country to the estate sought to be administered, unless it is very clearly established that there is no personal estate of the deceased within the jurisdiction in respect of which ancillary letters probate could be obtained. It is possible in this country to have an administration of the real estate, without a general administration, in a very special case; but that should be made upon pleadings and not by way of summary application.

Justin, for the motion.

Masten, contra.

LAVERY v. WOLFE.

Production of papers on examination for discovery.

A motion to commit the plaintiff for not producing certain papers on his examination before a special examiner under the G. O. 138, 140.

The plaintiff was served with a subpoena *ad testificandum* with a special clause therein requiring him to produce certain letters, books, and documents, at the time and place appointed for examination; but he failed to produce the required papers.

Held, that the endeavour to combine the two methods of discovery (examination of parties and production of documents) by means of an examination and a subpoena *duces tecum*, is not to be encouraged by treating non-production as a contempt. The proper course was to have had the examiner direct what should be produced, and to have adjourned the examination for the purpose of procuring the documents.

[24TH NOVEMBER, 1884.]

DUNSFORD v. CARLISLE.

Discovery—Privilege—Answers tending to incriminate—13 Eliz. cap. 5.

Held, that the penal provisions of 13 Eliz. cap. 5, afford no excuse for a refusal by a defendant, in an action brought to set aside a fraudulent conveyance, to answer questions put to him regarding the fraudulent transaction.

Shepley, for the plaintiff.

Smoke, for the defendant.

[OSLER, J. A., 19TH SEPTEMBER, 1884.]

CLARKE v. RAMA TIMBER TRANSPORT CO.

Security for costs—Common interest—Action by representative plaintiff.

An application by the defendants for security for costs, on the ground that the plaintiff was without means and merely a nominal plaintiff suing for the benefit of others. It appeared that the plaintiff asserted a cause of action in which no one but himself was interested, viz., a claim for damages for the flooding of the land leased by him; but that there were several other persons interested in establishing the liability of the defendants for flooding their lands by the same overflow of which the plaintiff complained, and that these persons had agreed to contribute to the plaintiff's costs of this suit. It was alleged by the defendants, but denied by the plaintiff, that he had not means sufficient to pay the costs of the action if it was decided against him.

Held, that the defendants were not entitled to security for costs. *Clark v. St. Catharines*, 10 P. R. 205; 4 C. L. T. 91. distinguished.

Arnoldi, for the motion.

Holman, contra.

[29TH OCTOBER, 1884.]

REGINA v. BASSETT.

Conviction under the Vagrant Act.

A motion for the discharge of the prisoner, who was convicted and sentenced to 5 months' imprisonment under the Vagrant Act.

Held, that the Vagrant Act does not warrant an arrest, much less a conviction, on mere suspicion of dishonest intentions, or of vagrancy. Before a person can be convicted of being a vagrant of the first class named in the Act ("All idle persons who, not having visible means of maintaining themselves live without employment") he must have acquired in some degree a character for not being able to pay his way, or, being apparently able to do so, yet be shown to live without employment.

The prisoner was arrested at the Union Station, Toronto, having been pointed out to the police by some railway officials as a suspicious character, and had upon his person when arrested two cheques, one for \$1,700, the other for \$900 (which were sworn to be such as are used by confidence men), a mileage ticket (nearly exhausted) in favour of another person, and \$8 in cash. He vouchsafed no explanation of the cheques or the ticket, and gave no information about himself. Under these circumstances an order was made for the prisoner's discharge.

Morson, for the prisoner.

J. R. Cartwright, for the Attorney-General.

[10TH NOVEMBER, 1884.]

VANSTADEN v. VANSTADEN.

Interpleader—Costs—Special directions to sheriff—Adverse claim contemplated

An appeal from the direction of the Master in Chambers as to costs, on a sheriff's interpleader application, where the execution creditor abandoned after the claimant's affidavit had been filed.

Held, that when, in addition to the writ of *fi. fa.* goods placed in the sheriff's hands, special directions are given to the sheriff to seize particular goods, the rule is that if the execution creditor abandons after interpleader proceedings have been taken, he must pay the sheriff's costs; and there is no limitation to the rule that the special directions must have been given in contemplation of an adverse claim.

Aylesworth, for the sheriff and claimant.

W. H. P. Clement, for the execution creditor.

[FERGUSON, J., 16TH JUNE, 1884.]

MCMILLAN v. WANSBROUGH.

Examination of witnesses on pending motion—G. O. 266.

On an appeal from the taxing officer,

Held, overruling *Monaghan v. Dobbin*, 2 C. L. T. 260, that G. O. 266 has not been superseded by Rule 285, but is still in force.

Masten, for the appeal.

Hoyles, contra.

[ROSE, J., 23RD JULY, 1884.]

REGINA v. NUNN.

Conviction—Certiorari—Return—Recognizance—Negativing exception—By-law—Ultra vires—Evidence.

Writs of habeas corpus and certiorari having been issued under R. S. O. cap. 70, sec. 8 and returns made, a motion was made to file the returns.

Held, that the return to the certiorari is made for the assistance of the Court, and that it is not necessary to enter into a recognizance.

The conviction was for that the said Nunn, etc., did at London, etc., beat a drum on a public street called Dundas street in the said city, contrary to a by-law of said City of London, which provided (sec. 2) that "no person shall in any of the streets, or in the market place, of the City of London, blow any horn, ring any bell, beat any drum, play any flute, pipe, or other musical instrument, or shout, or make or assist in making any unusual noise, or noise calculated to disturb the inhabitants of the said city. Provided always that nothing herein contained shall prevent the playing of musical instruments by any military band of Her Majesty's Regular Army, or any branch thereof, or of any Militia Corps lawfully organized under the laws of Canada."

Held, that it was not necessary to negative in the conviction or commitment the exception contained in the above proviso.

The statutory provision under which the above by-law was passed, 47 Vict. cap. 32, sec. 13, s-s. 12, gives power to Municipal Councils "to pass by-laws for regulating or preventing the ringing of bells, blowing of horns, shouting and other unusual noises, or noises calculated to disturb the inhabitants." No evidence was given on behalf of the prosecution to show that the noise made by beating the drum was unusual, and evidence on behalf of the prisoner was refused.

Held, that as beating a drum is not mentioned in the Statute, the by-law, so far as it seeks to prohibit the beating of drums simply, without evidence of the noise being unusual or calculated to disturb, is *ultra vires* and invalid.

Held, also, that evidence should have been received on the prisoner's part.

McMichael, Q. C., and *R. M. Meredith*, for the motion.

Osler, Q. C., and *T. G. Meredith*, contra.

[THE MASTER IN CHAMBERS, 5TH NOVEMBER, 1884.]

BROWN v. NELSON.

Interpleader—Shares in a Company.

A sheriff having seized certain shares of the capital stock of a public Company, under a writ of *fi. fa.* goods, and having received notice of a claim to the shares made by an assignee of the judgment debtor, applied for the usual interpleader order.

Held, that goods and chattels include shares for all the purposes of the Execution Act, and of the clauses for relief to the sheriff by interpleader.

Aylesworth, for the sheriff.

C. R. W. Biggar, for the execution creditor.

Wallace Nesbitt, for the claimant.

[8TH NOVEMBER, 1884.]

BROWN v. NELSON.

Set off—Costs—Solicitor's lien.

A motion by the defendant to set off so much of the money recovered by the defendant against the plaintiff, on the defendant's counterclaim, as will cover the costs adjudged to the plaintiff on his recovery against the defendant on his statement of claim. The plaintiff's solicitor asserted a lien for costs, which they contended should operate to prevent the set off.

Held, under the circumstances, that the plaintiff's solicitor had no right to interpose his interests to prevent equity being done between the principal parties.

C. R. W. Biggar, for the motion.

Wallace Nesbitt, contra.

County Court, York.

JENNINGS v. NAPANEE BRUSH Co.

Promissory note—Interest payable in instalments before maturity—Presentment and notice of dishonour for nonpayment of interest.

A promissory note was payable in 18 months after date, with interest at seven per cent. per annum, payable half-yearly.

Held, that, in order to bind the endorser, it was necessary to present the note for each instalment of interest, and give notice to him of dishonour.

The plaintiff, the holder of a promissory note, brought his action against the makers and John Stevenson, an endorser, to recover two instalments of interest alleged to be due in respect of the note. The note was in the following words:—

\$4,290.

NAPANEE, 19 APRIL, 1882.

Eighteen months after date the Napanee Brush Co. promise to pay to the order of G. M. Elliott the sum of \$4,290, at the Dominion Bank here, with interest at the rate of seven per cent. per annum payable half-yearly, value received.

(Signed) NAPANEE BRUSH Co.

per D. H. Preston, President

The action was commenced in July, 1883, to recover \$310.82, that being the amount of the first two half-yearly instalments of interest, then overdue by the terms of the note. While the action was pending, the note matured, and was dishonoured, and proper notice of dishonour was given to all the endorsers; and a second action was brought to recover the principal sum of \$4,290, and the last half-yearly instalment of interest.

Judgment was recovered in that action against all parties, including the defendant Stevenson; and execution was sued out and the amount realized from the defendant Stevenson.

The defences on the record relied upon by Stevenson were, that the note was not duly presented for payment of the instalments of interest sued for in the action; that he received no notice of dishonour and of the nonpayment of the instalments of interest sued for.

Shepley, for the plaintiff.

Wallace Nesbitt, for the defendant.

McDOUGALL, J.J.—The case is somewhat unique, for, after the most diligent search, I have been unable to find any English or Canadian authorities upon the precise point, and the learned counsel engaged in the case assure me that the result of their examination of the books has been equally fruitless.

Is a note dishonoured by the nonpayment of interest, where, by the contract, interest is made payable at certain fixed periods, which periods are to occur before the time fixed for the payment of the principal sum?

Oridge v. Sherborne, 11 M. & W. 374, is an authority deciding that a note, the principal of which is payable in instalments, is within 3 and 4

Anne cap. 9, so as to be assignable, and that notice of dishonour should be given on the maturity of each instalment if dishonoured, and that days of grace should be allowed with each instalment.

Carlton v. Kenealy, 12 M. & W. 139, decides that a note payable by instalments is within the Statute of Anne, although it contains a provision that, upon failure of payment of one instalment, the whole debt is to become due and payable.

Brooks v. Mitchell, 9 M. & W. 15, is to this effect, that a promissory note payable on demand *with interest*, cannot be treated as overdue so as to affect an endorsee with any equities against the endorser, merely because it is endorsed a number of years after its date, and no interest has been paid on it for several years before such endorsement.

The plaintiff contends that interest is a mere incident of the debt, and the failure to pay or demand the same at the stated periods in no wise dishonours the bill or note. I have been able to find some American cases which would appear to sustain this view. In *Daniels on Negotiable Instruments* the learned writer, at page 737, (vol. 1) 3rd Ed., states "that the weight of authority is to the effect that the *bona fide* purchaser for value of negotiable paper is within the protection of the law merchant, although interest is overdue and unpaid at the time of purchase, interest being a mere incident of the debt, and the holder losing no right as against the parties, whether makers or endorsers, by failing to demand it." "This, he says, "seems to be the correct rule, though the contrary view is not without some weighty consideration."

I will refer now to some of the cases cited in support of this statement. *Kelley v. Whitney*, 45 Wis. 110 (1878). In this case the Court approved of and followed the earlier case of *Boss v. Hewitt*, 15 Wis. 260. In the latter case Mr. Justice Paine, delivering the opinion of the Court said, "Neither do we think that the fact that the interest had not been paid, makes the case equivalent to a purchase after maturity, so as to let in defences that might have been made against the original parties. The interest is a mere incident of the debt, and although it is frequently provided that it shall be paid at stated periods before the principal falls due, we know of no authorities holding that a failure to pay it dishonours the note, so as to let in all defences against subsequent purchasers for value without any other notice of defects except the mere fact that such interest has not been paid; and we do not think it should have that effect. The maturity of the note, within the meaning of the commercial rule on the question, is the time when the principal becomes due."

Boss v. Hewitt is also approved in *National Bank of North America v. Kirby*, 108 Mass. 497 (1871), and the latter case is cited with approval and its general doctrines affirmed in *Cromwell v. County of Sac*, 96 U. S. 51, (1871).

In *The National Bank v. Kirby*, the following language occurs in the judgment of Colt, J.:—"Interest is an incident of the debt and differs from it in many respects. It is not subject to protest and notice to endorsers, or days of grace, according to the law merchant. Interest is not recovered on overdue interest, and the Statute of Limitations does not run against it until the principal is due. The holder of the note with

interest payable annually, loses no rights against the parties to it, whether makers or endorsers, by neglecting to demand it; and he has the election to do so or wait and collect it all with the principal." The learned Judge adds in another part of his judgment:—"There is a large class of negotiable securities, the principal of which is payable only at the end of many years, but with interest payable either annually or semi-annually; and many of the notes given in the purchase of real estate, and secured by mortgage, especially in the country, are of this class, as are most of the obligations for debts contracted by public, and many of those incurred by private corporations; and it is important that the value due to their negotiable character should not be impaired by new rules tending to lessen their currency and credit."

See also *Bigelow on Bills and Notes* (2 Ed.) 445. I find in the case of *Newell v. Gregg*, 51 Barbour, 263, an authority for the opposite view; and in that case it was expressly held that the payment of the interest at the fixed period was as much a part of the agreement as the promise to pay the principal, and that the effect of nonpayment of the interest was to dishonour the note. This case is cited in the case of *Cromwell v. County of Sac*, 96 U. S. 51, but is not commented on.

From the foregoing cases it may be concluded that the rule in the United States, as affirmed by high authority, is that the nonpayment of an instalment of interest payable by the tenour of the contract, and expressed on the face of the note before the date fixed for the payment of the principal, will not amount to a dishonour of the note; and that, as between subsequent holders for value without notice, and the endorsers, such nonpayment cannot be relied upon, even where there has been no presentment or notice of dishonour, that presentment and notice of dishonour are wholly unnecessary, and that notwithstanding the default the original liability of the parties is preserved.

It was argued before me that under the case of *Oridge v. Sherborne*, 11 M. & W. 374, which is the authority for giving notice of dishonour at the maturity of each instalment of a note the principal money secured by which is payable in instalments, the payment of an instalment of interest was equally within the authority of that case; that an instalment of interest payable at a fixed date was, to all intents and purposes, equivalent to an instalment of principal. There certainly does appear to be a close analogy, but if the American cases decide rightly that interest is a mere incident of the debt, "the natural growth" of the money, even when payable by an express term of the contract, then doubtless the defence set up here should fail.

But is interest a mere incident of the debt, within our own or the English authorities? With a certain propriety interest may be said always to be an incident to the principal; not only when it is part of the contract but also when it is allowed as damages. In the former case, it is, however, not strictly an incident, or rather it is more than an incident. There must be a principal sum; but after interest has accrued it is no longer dependent on the principal; it does not necessarily follow it; *Crouse v. Park*, 3 U. C. R. 458; *Hudson v. Fawcett*, 2 D. & L. 81; *Watkins v. Morgan*, 6 C. & P. 661. Conventional interest is of itself a debt, and payment of the

principal alone will not affect the right to recover the interest, and yet it is so allied to the principal that if the latter is recovered without the recovery of the interest when not secured by a separate instrument, it is barred; not because the interest cannot exist as a valid demand distinct from the principal; but because demands arising upon one agreement for principal and interest, due to the same party at the same time, cannot be divided, and each made the subject of a separate action. In that respect there is no difference between the principal and interest. An action brought for one would bar both, whether included in the claim for recovery or not. But such interest, made payable before the principal is due, may be sued for in an action for that alone, if brought before the principal is due; and if sued for before the maturity of the whole debt, it is really sued for as a part of the debt accrued due.

Can there be said to be any difference between an instalment of interest payable by a term of the contract, and an instalment of the principal itself payable in the same manner?

It seems to me that it is highly inconsistent to say that an action may be maintained for an instalment of interest every six months, and that the endorser shall be charged with it, without demand on the maker and notice of his failure to pay, and to say that, as to the payment of the principal in eighteen months, the endorser shall be discharged unless presentment is made and he is given proper notice of dishonour. Surely the contract of the endorser is the same with reference to each instalment, whether principal or interest. Is not his contract the following;—"The maker of this note has promised to pay you, the holder, at particular times and occasions, certain sums of money (call them principal or interest as you will), and I undertake that if he fails to pay you, and you promptly notify me of the fact, I will pay you."

If the Stamp Act were in force, the interest accruing during the eighteen months that this note had to run would have to be computed, and duty paid upon the whole sum or debt represented by the one contract. The interest here is not a penalty, or damages; it is debt, and in my opinion just as much so as the principal sum secured by the note.

The American cases referred to in support of the opposite view are, I think not to be followed. They are due to a line of decisions upon the question of interest which are admittedly at variance with the principles maintained in a number of English authorities. Mr. Sedgewick, in his work on Damages, very clearly points out the distinction between the American and English authorities. "There is," says that writer, "considerable conflict and contradiction between the English and American cases on this subject. But as a general thing it may be said that, while the tribunals of the former country restrict themselves generally to those cases where an agreement to pay interest can be proved or inferred, the Courts of the United States, on the other hand, have shown themselves more liberally disposed, making the allowance of interest more nearly to depend on the equity of the case, and not requiring either an express or implied promise to sustain the claim. The leading difference seems to grow out of a different consideration of the nature of money. The American cases look upon the interest as the necessary incident, the natural growth of the

money, and therefore incline to give it with the principal, while the English treat it as something distinct and independent, and only to be had by virtue of some positive agreement :'' *Sedgewick* (6 Ed.), 473.

In *Van Rensselaer*, 2 Barb. S. C. R. 643, Mr. Justice Willard, at p. 666, says, "Whatever may be the rule in England, interest in this country is not considered as a demand, distinct from, and independent of the original debt, and resting solely upon contract express or implied. It is treated rather as an incident to the debt, always payable when there is a promise express or implied to pay it, and in numerous instances when no such promise can be inferred."

Referring again to the cases cited by me in support of the plaintiff's contention, *The National Bank v. Kirby* was an action against a maker only, who claimed that the non-payment of the interest dishonoured the bill, and that the plaintiff in that action, taking the bill with interest unpaid, took it subject to all the equities. *Kelley v. Whitney* was an action also against joint makers only, who set up the same defence as in the last case. *Boss v. Hewitt* was also against a maker, who claimed the benefit of the same defence as in the last two cases, alleging that the notes had been obtained from him by fraud.

Suppose the whole debt in this case, principal and interest, had been secured by four several notes endorsed by the defendant, one promising to pay the amount of six months' interest, naming the dollars and cents, in six months from the date of the note; another note, the same amount in one year; another note, the same amount in eighteen months; and another note, the principal sum in eighteen months. Could recovery be had upon these notes against the defendant, endorser, without demand and notice of dishonour? As against the endorser, I do not think that the plaintiff is to have any greater benefit by reason of the whole contract being on one piece of paper promising to pay the interest half yearly.

These conclusions compel me to examine another branch of the plaintiff's case. He replies to the defences raised, besides taking issue, and alleges a waiver of notice of dishonour by an express promise on the part of the defendant to pay the instalments of interest sued for, after he, defendant, had become aware of the default of the maker.

The defendant, at the date of the trial, was dead; the proceedings being revived against his executors. The only evidence of the alleged waiver was that given by the plaintiff himself, who testified to certain negotiations for a settlement with the defendant, both of this suit and of the suit in which he had obtained judgment for the principal of the note and the last instalment of interest. He says that in these negotiations the defendant unequivocally promised to pay the interest sued for in this action. There is no corroboration of this statement, except that the plaintiff contends two letters, one written by the defendant and the other by his solicitors, both dated the 16th November, 1883, substantiate it. In the letter written by the defendant, he expressly writes that portion of the letter referring to the County Court suit without prejudice. The propositions of settlement contained in the letters, the plaintiff himself says, were rejected; and it was not until some days after their date that the plaintiff saw the defendant personally, and had the negotiations, during which he states the

defendant promised to pay the interest sued for in this action. In view of these facts the letters can hardly be said to corroborate alleged admissions made some days after they were written and received. It is quite true that if the letters themselves constituted a waiver, they might be sufficient of themselves as an admission of liability; but the reception of the defendant's letter was objected to at the trial as having been written without prejudice, and after careful consideration I think the letter inadmissible as evidence in this action. The letter of the solicitors does not admit liability, but says that the defendant proposes to pay if time is given, a conditional proposition, which the plaintiff says at that time was rejected. I must therefore rule that there is no evidence of any waiver, the plaintiff's evidence on that point not being corroborated sufficiently to comply with our statute on the subject.

I think, therefore, that the plaintiff's action, so far as the defendant Stevenson is concerned, should be dismissed with costs.

NEW BRUNSWICK.

In the Supreme Court.

[OCTOBER, 1883.]

TOWER v. outhouse.

Practice—Argument of counsel—Parties bound by.

Parties are bound by the views presented by their counsel in arguing cases; and the Court will not entertain a motion to set aside or alter their judgment on the ground that counsel had misapprehended the point to be argued or was not sufficiently instructed.

[NOVEMBER, 1883.]

JONES v. DeWOLF.

Contract by correspondence—Construction of.

Where it is sought to establish a contract from a correspondence, the whole of the correspondence which has taken place between the parties must be taken into consideration; accordingly, where a letter written by the plaintiff to the defendant and replied to by the latter made a complete contract, but before the contract was performed or there was any breach other letters passed between the parties from which it appeared that both parties still treated the matter as being in negotiation.

Held, that there was no binding contract.

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